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The current issue is the fourth of the tenth volume of the *Athens Journal of Law (AJL)*, published by the *Business and Law Division of ATINER*.

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Relying on Human Rights Treaties to establish access to Same-sex registered Partnerships and Marriage – Confronting the Question of Cultural Sensitivities

By Helen Fenwick[*] & Daniel Fenwick[♦]

This piece sets out to compare the stance of the Inter-American Court of Human Rights (IACtHR) under the American Convention on Human Rights (ACHR) with that of the European Court of Human Rights (ECtHR) (known as Strasbourg Court) adjudicating on the European Convention on Human Rights (ECHR) in relation to family rights of same-sex couples. Specifically, it looks at the stances taken by the two Courts towards same-sex relationship formalisations – registered partnerships and marriage – exploring their responses to the stances taken in the states within their jurisdiction towards such formalisations. This article confronts and compares the stances taken by the two Courts, and their underlying bases, when they encounter the varying stances on this controversial issue taken in the states in question, relating to cultural predilections. The article concludes that reliance on finding a consensus among the contracting states in this context has had a detrimental impact on the Strasbourg jurisprudence in terms of upholding the principle of non-discrimination, an impact that can be traced to discriminatory stances taken in a number of the ECHR-contracting states towards same-sex unions. It finds in contrast that the Inter-American Court of Human Rights has not accepted that finding such a consensus should affect its decisions in this context, and therefore it has not allowed cultural acceptance of homophobia to affect its stance.

Keywords: *ACHR; ECHR; ECtHR; IACtHR; Same-sex marriage; Strasbourg Court*

Introduction

This article sets out to compare the stance of the Inter-American Court of Human Rights (IACtHR) under the American Convention on Human Rights (ACHR) with the European Court of Human Rights (ECtHR) - which is known also as the Strasbourg Court - adjudicating on the European Convention on Human Rights (ECHR) in relation to family rights of same-sex couples. Specifically, it looks at the stances taken by the two Courts towards same-sex relationship formalisations – registered partnerships and marriage, exploring their

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responses to the stances taken in the states within their jurisdiction towards such formalisations. The various states in question take a range of stances towards such formalisations which are reflective of the social and cultural attitudes domestically towards same-sex couples. Thus certain states introduced same-sex marriage some time ago,[1] whereas others remain adamantly opposed not only to such marriage,[2] but also to same-sex registered partnerships, due to strong prejudice evinced against gay relationships by government, religious bodies and much of the populace. This article confronts and compares the stances taken by the two Courts, and their underlying bases, when they encounter the varying stances on this controversial issue taken in the states in question. It analyses the way that the jurisprudence of the two on this matter has developed in the face of such stances taken domestically.

It is well established that the Strasbourg Court has had a significant influence in terms of furthering the protection of sexual minorities.[3] Clearly, it was in part set up to ensure the protection of minorities who had suffered in Nazi Germany, and, more generally, to protect them since they would not necessarily receive protection via majoritarian support through the democratic process. But at the same time, the Court views its protection for the Convention rights as subsidiary to the protection offered in the member states. Its use of the margin of appreciation doctrine is obviously linked to that stance, and the width of the margin conceded in particular instances is linked to the role it has conceded to *consensus analysis* in its decisions.[4] The term 'consensus' is often taken to denote identifying common ground between the laws of a majority of member states in relation to the domestic protection for particular rights.[5] *Lack* of consensus among the member states means that the margin of appreciation conceded to the state widens;[6] therefore the likelihood of finding a breach of the relevant Article – in this instance usually Article 8 – diminishes.[7]

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[1]In Europe: Netherlands (2001) and Belgium (2003), the first and second countries in the world to do so, and Denmark (2012) (which was also the first country in the world to legalise civil partnerships in 1989). In the Americas: USA: Massachusetts (2004); Canada (2005), Argentina (2010).

[2]In Europe, definitions of marriage which exclude same-sex marriage exist in the Constitutions of Armenia, Bulgaria, Croatia, Georgia, Hungary, Latvia, Lithuania, Moldova, Montenegro, Poland, Serbia, Slovakia and the Ukraine. In the Americas, despite recent repeals in the Caribbean, there continue to exist states that *penalise* consensual same-sex relations: Grenada, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, as well as Guyana in South America.

[3]See Harris, O'Boyle, Warbrick & Bates (2023); Wintemute (2013); *Dudgeon v UK*, no. 7525/76, ECtHR (22 October 1981); *Norris v Ireland*, no.10581/83 ECtHR (26 October 1988), para 47; *Modinos v Cyprus*, no. 15070/89 ECtHR (22 April 1993; *Alekseyev v Russia*, nos. 4916/07, 25924/08, 4599/09 ECtHR (21 October 2010); *HG and GB v Austria*, nos. 11084/02, 15306/02 ECtHR (2 June 2005); *RH v Austria*, no. 7336/03 ECtHR 61 (19 January 2006).

[4]See Dzehtsiarou (2015).

[5]See further Wildhaber, Hjartarson & Donnelly (2013); Arden (2015) at 313-315; Dzehtsiarou (2011).

[6]See McGoldrick (2016) at 28.

[7]See as to the Court's general stance: *Goodwin v United Kingdom* (1996) 22 *EHRR* 123 at [103]; *Bayatyan v Armenia* (2012) 54 EHRR 15 at [108]; but cf *ABC v Ireland* (2011) 53 EHRR 13 at [237] in the abortion context. For discussion of the margin of appreciation doctrine see: Legg (2012); Bates (2015); Fenwick (2015).

In *this* context – the protection of the interests of sexual minorities in relation to formalisation of relationship statuses - consensus analysis has played a particularly prominent role. The problem is, clearly, that the use of this mechanism, influencing the margin of appreciation conceded to states means that the cultural sensitivities of majorities in member states – influenced by acceptance or non-acceptance of formalisations of gay relationships, in particular including via same-sex marriage – is able to find purchase in Strasbourg Court decisions. That purchase has resulted, as will be discussed, in a reluctance to declare a clear right to same-sex registered partnerships under the ECHR, and a refusal so far to accept marriage equality.

As will be explained in the second half of this article, the same cannot be said of the IACtHR in interpreting the ACHR in this context. The American Convention includes guarantees broadly equivalent to those relevant in this context under the ECHR: equivalents to Articles 12, 8 and 14.[8] Admittedly, the wording of the equivalent of Article 12 of ECHR - right to marry - differs under the American Convention (Article 17(2)), but the wording of Article 12 of ECHR is not in itself determinative of the reluctance at Strasbourg Court to recognise same-sex marriage.

Given that consensus analysis and reliance on the margin of appreciation doctrine has *not* played a part in the IACtHR jurisprudence in this context, that Court has therefore had a strong influence in furthering or potentially furthering the spread of same-sex marriage in South America and a number of Caribbean states. Conversely, the Strasbourg Court's interpretation of the ECHR has had a *retarding* impact on that spread in such states, as will be explained below, largely due to the influence of consensus analysis on the relevant Strasbourg jurisprudence. Thus – paradoxically – the two Conventions are in effect pulling in opposite directions in some of the states in question in relation to marriage equality. In order to illustrate the current and future impact of the Strasbourg stance in ECHR-contracting states, and also in some Caribbean states, this paper will turn below to analysing the relevant Strasbourg jurisprudence. The analysis will reveal the influence of the Strasbourg Court up to 2024 on formalisations of the relationships of same-sex couples in member states.

The Authority and Influence of the Strasbourg Court

Before turning to the jurisprudence in question, some remarks on the general influence and authority of the Strasbourg Court are needed. Findings in the Court command in general a high level of respect in the contracting states, and the influence of the ECHR on human rights as interpreted and applied by the Court in

[8]There are broad equivalences between: Article 8 of ECHR (right to respect for private and family life) and Article 11 of ACHR (right to privacy), Article 12 of ECHR (right to marry) and Article 17(2) of ACHR (rights of the family: right to marry), Article 14 of ECHR (right to freedom from discrimination) and Article 1 of ACHR (obligation to respect rights) and Article 24 of ACHR (equal protection of laws).

the contracting states is clearly highly significant.[9] Once the ECHR was abolished, that meant that no administrative body was involved in the implementation of the ECHR, meaning that the Court's authority was enhanced. That does not, however, mean that if a state loses a claim it will necessarily act rapidly or effectively to change its law or practice to remedy the breach. But states in general do respond eventually to a Strasbourg Court ruling finding them in breach of a particular right or rights, and measures are available seeking to ensure the execution of the judgment[10] although in general the Court seeks to maintain its authority without forms of coercion. Therefore it seeks to avoid taking stances that may alienate certain contracting states due to their particular cultural sensitivities and/or religious positions. That largely explains its reliance on consensus analysis.

In this context the Strasbourg Court obviously cannot itself introduce a legal right to access a same-sex registered partnership in any contracting State: it can only declare that such a right arises under the ECHR, which has been violated. Under Article 46 of the ECHR, the State in question is bound to respond, but in practice it is then up to the legislature to consider when (and if) to respond and in what form. Other States would then have duties under Article 1 of the ECHR to implement any such ruling but some may refuse to do so or be slow and reluctant to do so.[11] For example, the Moldovan Orthodox Church reacted to the *Fedotova* decision discussed below[12] by urging the government not to allow gay couples to register a partnership, thus demanding that it should refuse to comply with the ruling.[13] It appears that the government has failed to state in response that it might comply with it in future as an aspect of its Article 1 duties.[14] Such responses to the Court's rulings go some way to explaining its reluctance to move beyond the stances of the various states under its jurisdiction in the context under discussion, until it finds that a majority of member states have already taken the steps in question – in this instance in introducing same-sex registered partnerships via domestic legislation.

The Spread of Same-sex Marriage and Registered Partnerships in the Member States

The spread of same-sex marriage and registered partnerships has been uneven among the member states: some Western states have been much slower than others to introduce same-sex marriage[15] or registered partnership schemes for

[9]E.g. *Sunday Times v UK* (1979) 2 EHRR 245.

[10]For discussion of execution of the Court's judgments see Harris, O'Boyle, Warbrick & Bates (2023) at chapter 4.

[11]See e.g. *Hirst v United Kingdom* (2006) 42 EHRR 41 [GC], in the context of prisoner voting rights.

[12]*Fedotova v Russia*, nos. 40792/10, 30538/14 and 43439/14 ECtHR [GC] 17 January 2023.

[13]See Nescutu (2023a).

[14]However, a Moldovan gay couple has begun an action domestically for such registration, based on *Fedotova*. See Nescutu (2023b).

[15]Netherlands and Belgium, for instance, introduced same-sex marriage in 2001 and 2003 respectively, while Greece and Slovenia have only just introduced it in 2024. Same-sex marriage is

same-sex couples.[16] A number of 'Central-Eastern' states – not all – have shown no or little inclination to introduce such schemes[17] and even more so a reluctance to accept same-sex marriage. So where a state has not introduced any means of formalising their relationships for same-sex couples, claims at Strasbourg Court represent one means of bringing about change. But at the same time the Court is aware of these divergencies within the 47 member states, and their cultural and religious origins. In general, acceptance of same-sex registered partnerships (RPs) may be seen as one step towards introducing marriage equality and in any event they provide the couples in question with recognition of their relationship and with civic benefits. Strasbourg Court has been confronted with claims for both same-sex registered partnerships and marriage; therefore, the discussion below covers both formalisations of relationship status for same-sex couples under the ECHR.

Early Decisions on European Convention Protection for Same-sex Couples

The first step towards recognising a Convention right to formal recognition of their relationships for same-sex couples, taken in *Schalk*,[18] in 2011, was to recognise same-sex couples as 'families' under Article 8 read with Article 14 (the non-discrimination guarantee). That was a highly significant decision, but the Court did *not* reach it purely on the basis of the principle that since same-sex couples are as capable of exhibiting the characteristics of a 'family' as opposite sex ones, they should be treated accordingly. The Court instead relied quite heavily on the changing consensus as to the broadening of the concept of 'family' in member states. It found that a rapid evolution of social attitudes towards same-sex couples, and of the concept of 'family', had occurred. Therefore, it considered that same-sex couples could now be recognised as a form of family unit. But given its reliance on consensus analysis, it also determined in *Schalk* that the same-sex couple applicants should be debarred from accessing marriage under Article 12 of the Convention[19] due to the lack of a consensus on the matter.[20] At that point only a very small minority of member states had introduced same-sex marriage via legislation. The lack of a right to marry of same-sex couples under Article 12 precluded finding such a right under Article 8, which would also have been

currently available in Portugal, Spain, Switzerland, Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Andorra, Austria, Malta, Netherlands, Norway, Sweden, United Kingdom, Estonia, Switzerland. Liechtenstein will commence same-sex marriages in 2025. See further: Scherpe (2019); Balzarini, Blair & Walter (2024).

[16]Forms of same-sex registered partnership, but not marriage, are available in Croatia, Czech Republic, Cyprus, Hungary, Italy, Liechtenstein, Slovenia, San Marino, Montenegro, Monaco and Latvia.

[17]Neither marriage nor registered partnership is available at present for same-sex couples in Albania, Azerbaijan, Armenia, Bosnia and Herzegovina, Bulgaria, Georgia, Lithuania, Macedonia, Moldova, Poland, Romania, Russia, Serbia, the Slovak Republic, Türkiye, Ukraine.

[18]*Schalk and Kopf v Austria* (2011) 53 EHRR 20. Note that some aspects of this discussion of the cases of *Schalk*, *Vallianatos* and *Oliari* draw on Fenwick (2016).

[19]See the findings on same-sex marriage in *Hämäläinen v Finland,* no. 37359/09 ECtHR [GC], 16 July 2014 at [74].

[20]Ibid, at [58].

precluded due to the *lex specialis* status of Article 12. But in any event the same argument as to the consensus would also have applied under Article 8.

A further step towards accepting formal recognition of same-sex unions under the ECHR was taken in *Vallianatos v Greece*[21] in 2014. The applicants, who were in same-sex unions, challenged their exclusion from the registered partnership scheme introduced in Greece for different-sex couples, under Article 8 read with 14. The government sought under Article 14 to justify the exclusion of same-sex couples from the scheme on the basis of providing protection for the children of different-sex couples. In evaluating that justification the Court relied on consensus analysis, noting that a trend was currently emerging within the member states, by that point, with regard to the introduction of forms of legal recognition of same-sex relationships. Therefore, the Court conceded only a narrow margin of appreciation to the state. As a result the state's justification was strictly scrutinised: it had to be found to be *necessary* to refuse to introduce a same-sex registered partnership scheme in order to protect children in different-sex unions. That could not be found; as a result the Court determined that the proportionality demands under Article 14 were not satisfied. Accordingly, a breach of Article 14 read with 8 was found.

Establishing a Convention right to a Same-sex Registered Partnership but not Marriage

In *Oliari v Italy*[22] the Strasbourg Court took in 2015 a further and highly significant step towards finding that a right to a same-sex registered partnership arises under Article 8. Indeed, it is arguable that it did finally recognise that right in *Oliari*. It was confronted with a situation resembling that in *Vallianatos* but in which *no* registered partnership scheme had been introduced, even for different-sex couples. Three same-sex couples, who were supported by various activist organisations,[23] complained under Article 8 read alone or with 14, that Italy did not allow them access to a legal framework for formalising their relationships, so they were being discriminated against as a result of their sexual orientation – a protected ground under Article 8. In its judgment the Court did *not* concede a wide margin of appreciation to Italy because a thin majority of member states had by that time introduced same-sex registered partnerships. But the fact that the majority was thin may have encouraged it to view the notion of 'respect' for private and family life under Article 8(1) as a flexible one, finding that the requirements denoted by the term would vary considerably from case to case.

It identified two localised factors that influenced its findings as to those requirements. It found firstly that there was amongst the Italian population a popular acceptance of same-sex couples, as well as popular support for their "recognition and protection".[24] The second factor concerned the 'unheeded' calls

[21] *Vallianatos v Greece* (2014) 59 *EHRR* 12.
[22] (2015) 65 EHRR 957.
[23] They included ILGA-Europe.
[24] *Oliari v Italy* (2015) 65 EHRR 957 at [181].

of the Italian courts to introduce a legal framework[25] providing same-sex couples with such recognition.[26] Since no legal framework existed in Italy to provide recognition and protection for same-sex couples seeking formalisation of their relationships the Court found that a positive obligation arose under Article 8(1) to introduce registered partnerships for same-sex couples. Its decision to find that such an obligation arose was partly based on the strengthening consensus among the member states as to the acceptance of such partnerships by that point since a majority had by that time introduced them. But it implied that the obligation might only arise where those two localised factors were present, especially acceptance of gay relationships by the populace in general. It could be argued that the notion of finding a consensus among the member states, in terms of determining whether a breach of Article 8 had arisen, suffered a partial transformation in *Oliari* into relying on finding a consensus on formalisation of gay partnerships in a single state.

Strasbourg Court's exclusionary interpretation of Article 12 was also upheld in *Oliari* post-*Schalk* on the basis of a continuing lack of consensus in the member states as to the availability of same-sex marriage. So the claim of the applicants for same-sex marriage under Article 12 read alone or read with Article 14 was declared inadmissible. In *Orlandi v Italy*[27] the Court in effect reaffirmed in 2017 the stance taken in *Oliari* as regards same-sex registered partnerships. But, importantly, it left open the possibility that if the consensus on same-sex marriage among the member states did strengthen in future, it might be prepared to recognise a right to marry for same-sex couples under Article 12.[28]

The key decisions were in *Fedotova v Russia* in 2021 and 2023.[29] Although the two key local factors identified in *Oliari* did *not* apply in Russia, the Court and then the Grand Chamber were prepared to confirm that a right to a same-sex registered partnership did arise under Article 8. So they recognised a positive obligation placed on states to introduce such partnerships. That was partly on the basis that by that point a *stronger* consensus on the matter could be found among the contracting states. Therefore the Court and Grand Chamber did not rely on the idea that the right to respect for family life should be interpreted flexibly. Russia had provided no framework at all to provide protection for same-sex couples wishing to formalise their relationship. Therefore a breach of Article 8 was found.

But *Fedotova* had two limitations: firstly, states introducing a same-sex registered partnership scheme as a result of that decision only had to provide an

[25]Ibid, at [183]-[185].

[26]The Italian courts had found that same-sex unions should be protected as a form of social community under article 2 of the Italian Constitution, but that it was the role of the legislature to introduce a form of legal partnership covering such couples, not that of the judiciary: at [45]. An Italian Bill establishing same sex civil unions was approved by the senate's Judiciary Committee on 26 March 2015, but then stalled at the Committee stage.

[27]*Orlandi et al. v Italy*, nos. 26431/12, 26742/12, 44057/12 ECtHR (14 December 2017) at [204] and [205].

[28]*Orlandi et al. v Italy*, nos. 26431/12, 26742/12, 44057/12 ECtHR (14 December 2017) at [204] and [205].

[29]*Fedotova v Russia*, nos. 40792/10, 30538/14 and 43439/14 [GC], 17 January 2023.

'adequate' level of protection for the couples in such a partnership,[30] not a level on a par with that provided via marriage for different-sex couples. That was found on the basis that no consensus could be discerned on the level of protection to be accorded under same-sex registered partnerships among the contracting states. Thus, consensus analysis played both a positive and negative role in the decisions in *Fedotova*. Secondly, the Grand Chamber reaffirmed that no right to a same-sex marriage arises under Article 12, even read with Article 14. That was on the basis that there was still no consensus on acceptance of same-sex marriage among the contracting states – again an application of consensus analysis that had a negative impact on same-sex couples in the member states. After *Fedotova* four claims were brought from post-Soviet contracting states claiming a breach of Article 8 since no same-sex registered partnerships were available in the states in question. They were all, unsurprisingly, successful[31] since the states in question had, like Russia, provided no framework for the recognition and protection of same-sex couples, despite some legislative attempt to provide such frameworks.[32]

The reliance on finding a consensus in order to provide a higher level of protection via same-sex registered partnerships is therefore likely to cause problems in relation to future claims from some Eastern states because even if a state does introduce such partnerships, the level of protection they offer may be quite low, creating the obvious risk of acquiescing to prejudice against sexual minorities.

Contrasting Stances of the ECtHR and the IACtHR

Reliance on consensus analysis within the relevant Strasbourg jurisprudence is *also* retarding or potentially retarding the spread of same-sex marriage in some ECHR-contracting states which have overseas territories in the Caribbean. In some instances same-sex registered partnerships also have not been accepted, although that is contrary to the positive obligation recognised in *Fedotova*. Such states (including Bermuda, the Cayman Isles, Anguilla, British Virgin Isles, Montserrat, Turks and Caicos) are not under the jurisdiction of the IACtHR; therefore the interpretation of their own Constitutions is influenced by that jurisprudence – the jurisprudence on protections for same-sex couples discussed above. These territories have varying degrees of autonomy but are ultimately subject to the ECHR obligations of their respective European states. The influence of the Strasbourg Court jurisprudence in certain such states is discussed below, but it gives some acceptance to prejudice against sexual minorities since the Strasbourg Court does

[30]Ibid, at [190].

[31]*Buhuceanu and Others v Romania*, nos. 20081/19 and 20 others, ECtHR (23 May 2023); 2023; *Maymalukhin and Markiv v Ukraine*, no. 75135/02, ECtHR (1 September 2023); *Koilova and Babulkova v Bulgaria*, no. 4020/14, ECtHR (5 September 2023); *Przybyszewska v Poland*, no. 11454/17 ECtHR (12 December 2023).

[32]For example, prior to *Przybyszewska*, Polish legislators had introduced legislation on nine occasions unsuccessfully to allow for same-sex registered partnerships.

not accept a right to same-sex marriage, based on consensus analysis. In contrast, the IACtHR, as will be discussed below, has not accepted that consensus analysis should affect its decisions in this context, and therefore it has not allowed cultural acceptance of homophobia to affect its decisions. So reliance on the Strasbourg Court jurisprudence discussed in a range of Caribbean states – *not* just the contracting states – is on its face unlikely at present to further the spread of same sex marriage globally. The jurisprudence of the IACtHR may be viewed in contrast as nudging states under its jurisdiction towards acceptance of such marriage. As discussed below, reliance on consensus analysis within the relevant Strasbourg court jurisprudence has been found by IACtHR to potentially *retard* the spread of same-sex marriage in some Caribbean territories.

The result is that a Caribbean territory subject to the ECHR might be enabled to allow homophobia to influence its legal developments in relation to relationship-recognition and protection for same-sex couples, while legal developments in a state influenced by the American Convention might be affected in the opposing direction. However, as will be discussed below, despite its rejection of consensus analysis as an interpretative tool, the influence of IACtHR in furthering such recognition and protection is not as determinative as it might have been expected.

Family and Marital Rights of Same-sex Couples under the American Convention on Human Rights

IACtHR, while similar to the ECtHR in terms of its jurisprudence and interpretative approach, has a significantly reduced impact on states within its jurisdiction when compared to that of Strasbourg Court.[33] That is, in part, due to the fact that the Court is secondary to the Inter-American Commission and also because the primary regional power, the USA, has not ratified the ACHR, diminishing its influence. Thus applications go before the Commission first and as an administrative body it can reject applications. As indicated above, the ECHR, which had a similar role, was abolished. Additionally, ratification of the ACHR and IACtHR is separate to, and not essential for, membership of the Organisation of American States,[34] meaning that certain states have not ratified the American Convention.[35] As discussed below, the Court has considered, but rejected, the development of a doctrine of a 'margin of appreciation,' whose crucial significance in Europe has seen it incorporated into the Preamble to the ECHR. Related concepts, in particular the consensus doctrine, have similarly been rejected.

[33]That is despite the Organisation of American States having almost double the population of the Council of Europe. In 2020, for instance, the Strasbourg Court decided almost ten times as many cases as the IACtHR: see Report European Court of Human Rights (2020), and Report Inter-American Court of Human Rights (2020).
[34]See generally Pasqualucci (2013).
[35]Such as St Kitts and Nevis and Tobago.

The approach of the American Convention on Human Rights (ACHR) to claims of same-sex couples to relationship formalisations, including marital rights, was set out in a significant advisory opinion issued by IACtHR to Costa Rica.[36] This Opinion concerned a request that the American Court should interpret the scope of a number of rights under the ACHR including the right to privacy in Article 11, the right to equal protection of the laws in Article 24 and the right to non-discrimination in the enjoyment of such rights in Article 1 in relation to issues concerning gender identity and the rights of same-sex couples. The request concerned the matter of recognition of patrimonial rights, such as to social security, potentially arising under these rights, which could be accorded to same-sex relationships.

The Court had recognised that sexual orientation was a ground of prohibited discrimination in *Atala Riffo v Chile*[37] and in *Duque v Colombia*[38] – but only in 2013. The background to the Opinion was the lack of a common approach to same-sex relationships among those states that had ratified the American Convention immediately prior to 2016. In particular, four countries criminalised same-sex sexual activity in the form of archaic "buggery" laws or laws against "unnatural" sexual activity.[39] Also just five states had introduced same-sex marriage prior to 2016.[40] Across the entire Organisation of American States only eight of the thirty five members recognised same-sex unions in some form. As of 2024, twelve states recognise same-sex marriage or registered partnerships.[41] If the Strasbourg Court's approach described above based on consensus analysis in this context had been followed, it might appear, given the regional context, that there was an even stronger case for the Inter-American court to approach the issue of rights of same-sex couples to relationship formalisation with caution. However, in its advisory opinion in relation to the question of economic rights for same-sex couples, the Court not only found that the American Convention required equality in that sphere, the subject of the application by Costa Rica, but determined that it had authority to address broader issues of general equality.[42] It used the opportunity created by the application to issue, in effect, a general declaration that same-sex couples should enjoy equal rights in the family sphere with opposite sex couples under the American Convention.

As regards the interpretation of the scope of rights for same-sex couples, the Court found that the concept of "family" under Article 11 could encompass same-sex relationships, echoing Strasbourg Court.[43] Similarly, the Court found that the ACHR should encompass same-sex relationships in accordance with "the object

[36]Advisory Opinion OC-24/17 Requested by Costa Rica.
[37]*Atala Riffo and daughters v Chile*, IACtHR, Series C, 239 (2012).
[38]*Duque v Colombia*, IACtHR, Series C, 310 (2016).
[39]Barbados, Dominica, Grenada, and Jamaica.
[40]Those states are Columbia, Argentina, Brazil, Uruguay and Mexico.
[41]Same sex marriage was introduced in Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Ecuador, Mexico, United States and Uruguay. Bolivia introduced registered partnerships only (termed 'free unions').
[42]Advisory Opinion OC-24/17 Requested by Costa Rica, at [198].
[43]Ibid, at [199] and see also [180].

and purpose of the Convention," adopting an evolutive approach.[44] Quoting the Strasburg Court in *Schalk* and *Vallianatos* it found that it would be "artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy 'family life'" provided "there is an intention to enter into a permanent relationship and form a family".[45] The American Court also emphasised the right to autonomy (relevant to the ACHR rights to liberty in Article 7(1) and privacy (11(2)) – finding that "free and autonomous choice forms part of the dignity of each person and is intrinsic to the most intimate and relevant aspects of his or her identity and life project".[46]

Crucially – going beyond the European Court – and the area it was being asked to advise on, the American Court also considered the provision that most directly protects the right to marry, Article 17, the rights of the family. Article 17(2), equivalent to Article 12 ECHR, the right of "men and women of marriageable age" to marry and found a family. The Court considered marital rights under the ACHR to be relevant to the "mechanisms" that States would need to rely on to achieve equality in this sphere.[47] The Court took into account a range of international and domestic law. While it referred extensively to Strasbourg, it also took into account national courts, especially progressive judgments in the jurisdictions of the Organisation of American States.[48] The IACtHR placed significant weight upon the American case of *Obergefell*[49] which legalised gay-marriage. It found that "states can adopt diverse types of administrative, judicial and legislative measures to ensure the rights of same-sex couples," but observed that extending already-existing institutions—including marriage—to same-sex couples would be "the most simple and effective way" to ensure the realisation of the protection of economic and other rights of same-sex couples.[50]

Furthermore, the Court found that "there would be no sense in creating an institution that produces the same effects and gives rise to the same rights as marriage but that is not called marriage except to draw attention to same-sex couples by the use of a label that indicates a stigmatizing difference […]".[51] Therefore, the recognition of same-sex family/economic rights via registered partnerships only, as accepted by Strasbourg on the basis of consensus analysis, was rejected by the Court.

In coming to this conclusion, the Court explicitly stated that the lack of consensus among the member states did not provide a valid ground for refusing to recognise the equal right to marry under the ACHR.[52] In strong contrast to the stance of the ECtHR it found that the lack of consensus among the states as regards rights of sexual minorities "cannot be considered a valid argument to deny or restrict their human rights, or to reproduce and perpetuate the historical and

[44]Ibid, at [187].
[45]Ibid, at [192] and see also [225].
[46]Ibid, at [225].
[47]Ibid, at [200].
[48]Ibid, at [213].
[49]*Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al.*, 576 US (2015).
[50]Advisory Opinion OC-24/17 Requested by Costa Rica, at [218].
[51]Ibid, at [224].
[52]Ibid, at [83] and [219].

structural discrimination that these groups or persons have suffered".[53] It held that the controversial status of same-sex marriage in some countries, and the lack of consensus on legal accommodations for same-sex couples could not lead the Court to abstain from taking this decision, since it must only refer to the obligations that States had accepted under the American Convention.[54]

As a result of this judgment, and the subsequent finding of the Costa Rican supreme court which relied upon it, same-sex marriage became legal in Costa Rica in May 2020. The judgment met, however, with significant opposition and even disavowal by the constitutional courts of four ACHR signatories.[55] This important judgment has nevertheless been influential in some states in the Americas[56] – including those that had not signed up to the American Convention, influencing, directly or indirectly, constitutional litigation in certain UK Overseas Territories, themselves connected to the European Human Rights system.[57] This created a conflict between the cautious ECtHR approach set out above, and that of the Inter-American Court.

ECtHR Retarding the Spread of Marital Rights of Same-sex Couples in the Caribbean?

The following litigation illustrates the difference between the approaches of the two Courts in this context. In 2018, two Caymanian applicants challenged the lack of same-sex marriage or recognition of registered partnerships under the Islands' constitutional Bill of Rights.[58] The Bill of Rights is closely based on the ECHR and the applicants relied upon provisions equivalent to Article 8 (section 9(1)), Article 9 (section 10(1)), Article 12 (s14(1)) and Article 14 (section 16(1)).[59]

In the court of first instance the Chief Justice upheld the petitioners' claim. The court found that the refusal to register the marriage engaged the right to respect for private and family life under section 9 and the right to found a family under section 14, on the basis that same-sex couples are capable of enjoying 'family life' and of committing themselves sincerely to a stable, long-term relationship of mutual love and respect.[60] In coming to this conclusion, the court took account of international jurisprudence, placing significant reliance upon the approach of the Inter-American Court of Human Rights in its Advisory opinion to Costa Rica.[61] It also considered a separate issue of particular local significance

[53]Ibid, at [219].
[54]Ibid.
[55]Peru, Panama, Honduras, Suriname. Honduras: Vallecillo (2022); Panama: Smith (2023); Peru: Dunkelberg (2022); Suriname: Leeuwin (2023).
[56]For example, Ecuador.
[57]For example in the Cayman Isles and Bermuda – see discussion below.
[58]*Day v The Governor of the Cayman Islands and others*, Civil Cause nos. 111 & 184 of 2018 (29 March 2019).
[59]The Cayman Islands Constitution Order 2009, SI 2009/1379, Sched 2.
[60]*Day and another v The Governor of the Cayman Islands and another* [2022] UKPC 6 at [226].
[61]Ibid, at [200].

raised by the applicants: the right to freedom of conscience under section 10 of the Bill of Rights. The petitioners argued that this was engaged by the enactment of a 2008 amendment to the Marriage Law which set out an exclusionary definition of marriage.[62] The court found that this had been enacted on the basis of "the proponents' understanding of the Islands' religious, moral and cultural heritage".[63] It held that the petitioners' inability to marry engaged this right on the basis that the exclusion prevented them from manifesting their belief in the institution of marriage, and that Caymanian law – which identified marriage with opposite-sex couples – amounted to an imposition of religious belief upon them.[64]

Having found these rights to be engaged, the Court considered the question of justification, straightforwardly finding this to be lacking, given the largely procedural defence mounted by the state which did not seek to defend the substantive disparity of treatment between same-sex and opposite-sex couples.[65] In particular, the Court rejected the government's argument, equivalent to that put forward in *Schalk*, that the right to marry in section 14 of the Bill of Rights, which refers to marriage between men and women of the opposite sex, amounted to a textual commitment to exclusive marriage.[66] The failure of this argument in relation to s14 was similarly fatal to the government's claim that the *lex specialis* doctrine prevented the other enumerated rights in the Cayman Bill of Rights from being engaged where the basis of the claim was access to same-sex marriage.[67] The Chief Justice therefore upheld the petitioners' claim on both counts, finding that formal recognition of the union of same-sex couples was required, and ordered that same-sex marriage should be legalised. This finding was then the subject of an appeal by the deputy registrar and attorney-general.[68]

The Cayman Court of Appeal was influenced by the particular relevance of the ECHR and its associated jurisprudence to the Cayman Isles' constitution.[69] Accepting the government's argument, the Court adopted a more conservative approach to constitutional interpretation than had the Chief Justice, and it criticised the reliance placed in the lower court upon comparative legal material.[70] It found that as a matter of textual analysis, the close relationship between the text of the European Convention and that of the Caymanian constitution, meant that the approach of the Council of Europe institutions, and especially of Strasbourg, must be preferred.[71] It therefore referred at length to the Strasbourg jurisprudence discussed above, and found that neither the right to respect for private and family life nor freedom of religion/conscience could be the basis of introducing an equal right to marry under the Cayman Bill of Rights due to its relationship with the

[62]Ibid, at [112]. Marriage Law (2010 Revision), section 2.
[63]*Day and another v The Governor of the Cayman Islands and another* [2022] UKPC 6, at [22].
[64]Ibid, at [131].
[65]Ibid, at [297]-[306].
[66]Ibid, at [194] and [272].
[67]Ibid.
[68]*Day and Bodden-Bush v Deputy Registrar of the Cayman Islands and another*, CICA No. 9 of 2019 (7 November 2019).
[69]Ibid, at [41], [98].
[70]Ibid, at [109].
[71]Ibid, at [99].

ECHR. It focused instead upon the lack of a right to same-sex marriage under Article 12 of the ECHR, finding support for this position from the lack of European consensus and from the European Court of Human Rights' finding in *Schalk* that the lack of a right to marry in Article 12 precluded finding such a right under Article 8. On this basis the Attorney General's appeal was upheld.

As a result of this finding, the Cayman isles to this day does not recognise gay marriage. The case was appealed to the Privy Council[72] which, in a disappointing judgment, confirmed the approach of the Court of Appeal; thus the cautious approach of the ECtHR rather than that of the bolder IACtHR was taken. The Court of Appeal, however, had declared that the lack of a legislative scheme governing same-sex registered partnerships was unconstitutional and impinged upon the rights of its LGBTQ+ citizens, as in *Oliari,* and called for legislative intervention.[73] Responding to this, the Caymanian government legislated in favour of same-sex civil partnerships in 2020, a development endorsed by the Privy Council.[74] Therefore, while the influence of the EtCHR on *marital* rights was regressive, the incrementalism shown by the jurisprudence discussed above, did contribute to securing respect for same-sex registered unions, an advance that should not be dismissed. Nevertheless, the reliance upon the ECHR jurisprudence, as interpreted by a conservative UK judiciary, to restrict a domestic court advancing equal *marriage* rights can arguably be seen as contrary to the rationale of the Convention to secure *universal* enjoyment of fundamental rights.[75] This is particularly so as regards the issue of respect for freedom of conscience and belief, raised in the litigation, which is of acute import to the Cayman islands, given their history of cultural allegiance to Christianity. In other words, it had been claimed by the applicants – but not accepted by the Court of Appeal – that a belief in equal marriage should have the same status under section 10 of the Cayman Bill of Rights as a belief in different-sex marriage.

A similar situation occurred in Bermuda: same-sex marriage was legalised as a result of a first instance ruling, *Godwin and DeRoche v Registrar-General*,[76] on the basis that the lack of availability of such marriage was contrary to the protection against unlawful discrimination on grounds of sexual orientation and religion or belief in relation to provision of a service contrary to section 2(2)(a) and section 5 of the Human Rights Act 1981. The legislature effectively overturned this decision, passing legislation that enshrined an exclusive conception of marriage – one restricted to different-sex couples – and which disapplied the Human Rights Act 1981.[77] This legislation was, in turn, declared unconstitutional in a decision of the appellate court in *Ferguson v Attorney General*, on the basis that the enactment of the law violated the right to freedom of

[72]*Day and another v The Governor of the Cayman Islands and another* [2022] UKPC 6.
[73]*Day and Bodden-Bush v Deputy Registrar of the Cayman Islands and another*, CICA No. 9 of 2019 (7 November 2019) at [116].
[74]*Day and another v The Governor of the Cayman Islands and another* [2022] UKPC 6 at [2]. Cayman Islands Civil Partnership Law (2020).
[75]ECHR, Preamble and Article 1.
[76]*Godwin and DeRoche v Registrar General and others* [2017] SC (Bda) Civ (5 May 2017).
[77]*Ferguson et al. v Attorney General (Bermuda)* [2018] SC (Bda) 45 Civ (6 June 2018). Domestic Partnership Act 2018, section 53.

conscience in the Bermudan Constitution (section 8).[78] As a result, in contrast to the Caymanian litigation, same-sex marriage was legalised by Bermudan courts. The Bermudan constitution, unlike the Caymanian Bill of Rights, or the ECHR, does not contain a right to marry. The Bermudan Court held that in light of the lack of a *lex specialis* provision confining the Bermudan constitution to an exclusionary interpretation of marriage, a right to same-sex marriage could be established under section 8.[79] The Bermudan Court considered itself able to reach that conclusion, in contrast to the findings of the Caymanian Court of Appeal in relation to section 10 of the Cayman Bill of Rights, since that instrument did include a right to marry – deemed to operate as a *lex specialis* provision. Having come to this conclusion, the Bermudan Court found, on a similar basis to the Caymanian first instance decision, that the lack of substantive justification for discrimination offered by the government meant that a violation of the applicants' rights to freedom of conscience was established.[80] It is important to note that the Inter-American Court of Human Rights' interpretation of the American Convention in the advisory opinion issued by the Court to Costa Rica[81] was influential to the Caymanian finding, which was in turn persuasive to the Bermudan Court of Appeal. However, the Bermudan Government was granted permission to appeal to the UK Privy Council.

The Privy Council disagreed with the two Bermudan courts. Echoing the stance of the Caymanian Appellate court discussed above, the Privy Council held that the domestic courts must follow Strasbourg jurisprudence,[82] briefly dismissing the relevance of the Inter-American Court of Human Rights' Advisory Opinion. The Privy Council rejected the Opinion as even persuasive authority for the interpretation of national Constitutions or International treaties concerning fundamental rights, referring to a lack of 'international consensus' on the issue of the right to same sex marriage.[83] The Privy Council was therefore critical of the Bermudan court's acceptance of the petitioner's claim that legally endorsed marriage could be required as a manifestation of belief.[84]

Given that the focus of the Bermudan case was on s8 of the Bermudan constitution – the right to freedom of conscience – the Privy Council found that Strasbourg had not upheld violations of Article 9 ECHR (providing the similar right to freedom of thought, conscience and religion) by applicants complaining about the lack of legal accommodation for religious marriage.[85] It pointed out that the focus of Strasbourg jurisprudence on formalisations of relationships for same-

[78]*Ferguson et al. v Attorney General (Bermuda)* [2018] SC (Bda) 45 Civ (6 June 2018). See also: *Attorney General (Bermuda) v Ferguson and others* [2022] UKPC 5 at [24]; Bermuda Constitution Order 1968, SI 1968/182 Schedule 2. The applicants' separate anti-discrimination argument under s12 of the Bermudan Constitution was also accepted by the appellate court.
[79]*Ferguson et al. v Attorney General (Bermuda)* [2018] SC (Bda) 45 Civ (6 June 2018), at [111].
[80]Ibid, at [93].
[81]Advisory Opinion OC-24/17 Requested by Costa Rica.
[82]*Attorney General (Bermuda) v Ferguson and others* [2022] UKPC 5, at [90].
[83]Ibid, at [93].
[84]Ibid, at [80] and [88].
[85]See *Eweida v United Kingdom* (2013) 57 EHRR 8, para 81.

sex couples, as discussed previously, has been on Articles 8, 12 and 14.[86] The petitioners' claim was characterised as being beyond the ambit of section 8 of the Bermudan constitution as an impermissible claim that domestic law should be altered to reflect their belief in lawful same-sex marriage.[87] The Privy Council further held that even if such a belief could fall within section 8 on that basis, the interpretation should follow the Strasbourg jurisprudence.[88] Therefore, the section should be read in light of Article 12, so that even if a right to marriage could be established under section 8, a right to *same-sex* marriage could not be.[89] This was considered to be the corollary argument to the *lex specialis* argument in relation to Article 8 of ECHR, as it was in the Caymanian Court of Appeal, and it was also similar to its findings in the *Bodden-Bush and Day* case.

Lord Sales, in a powerful dissent, found that the right to marry could be found within the right to freedom of conscience in the specific context of the Bermudan constitution, taking into account the particular Bermudan cultural history.[90] His Lordship drew a distinction between the Caymanian context in which the Bill of Rights closely followed the ECHR, and the Bermudan context in which the Constitution contained no similar *lex specialis* provision, thereby arguably restricting the former to an exclusively opposite-sex conception of a marital rights derived from the right to freedom of conscience and belief.[91] Freed from that textual restraint, his Lordship agreed with the substance of the Bermudan appellate decision, arguing that support for its stance could be found within the ECtHR jurisprudence, the relevance of which he accepted. Disagreeing with the majority's finding in relation to the issue of manifestation of belief, his Lordship referred to consistent Strasbourg jurisprudence on the issue of conscientious objection, including case-law specifically concerning same sex marriage.[92] Lord Sales found, quoting Strasbourg Court, that "[b]earing witness in words and deed is bound up with the existence of religious convictions"[93] and that, having endorsed the beliefs in religious opposite-sex marriages with legal effect, Bermuda's failure to endorse same-sex marriages in a like manner would amount to an interference with the right under Article 9 (partly echoed in section 8 of the Bermudan constitution).[94]

In relation to the issue of justification, Lord Sales echoed both the Caribbean courts and the IACtHR, in finding that no substantive justification for the difference in treatment had been established by the government; nor was it likely that any could be sustained that would be acceptable to a court.[95] Lord Sales also emphasised, in agreement with the IACtHR, that the historic stigma associated with same-sex attraction increased the severity of the interference with the

[86] *Attorney General (Bermuda) v Ferguson and others* [2022] UKPC 5, at [92].
[87] Ibid, at [78] and [80].
[88] Ibid, at [91].
[89] Ibid, at [92].
[90] Ibid, at [99].
[91] Ibid, at [165].
[92] Ibid, at [174]. *Eweida v United Kingdom* (2013) 57 EHRR 8, para 81.
[93] *Attorney General (Bermuda) v Ferguson and others* [2022] UKPC 5, at [177].
[94] Ibid, at [181].
[95] Ibid, at [204]-[207].

enjoyment of the right of freedom of conscience revealed by the petitioners' case.[96] In his view, the particular Bermudan constitution, interpreted in light of the Article 9 of ECHR guarantee that it reflects, supported the approach of the Bermudan courts on the issue.

This decision of the Privy Council clearly illustrates the divergence between IACtHR and the ECtHR on the issue of formalisations of relationship status in respect of same-sex unions. As discussed, the American Convention can be found to support the introduction of gay marriage: that cannot be said of the ECHR in light of the Strasbourg Court's findings on gay marriage in *Schalk,*[97] later reaffirmed in *Fedotova.*[98] Thus the findings based on the matter of consensus analysis in *Schalk* have been relied on to deny equal marriage even in the face of a contrary ruling of the appellate Court in Bermuda, based on the advisory opinion issued by the IACtHR to Costa Rica.[99]

Conclusions

The contrast drawn here between the stances taken by the ECtHR and IACtHR towards consensus analysis speaks in part to structural differences between the two regional human rights treaties, but also to the unprincipled nature of reliance on such analysis, enabling discrimination on grounds of sexual orientation, as occurred as a result of the Bermudan and Caymanian Privy Council decisions. The matter of introducing a right to have same-sex unions formally recognised is clearly highly divisive in a number of Eastern-Central European states, as it is in the majority of Caribbean states, including many signatories of the IACtHR, due to the cultural, religious and social sensitivities raised by the issue. The Strasbourg Court's finding that there is a right to a same-sex registered partnership under Article 8 is based, as discussed, on eventually finding a consensus on the matter in the contracting states. But equally its refusal to accept that a right to a same-sex marriage arises under Article 12, and its finding that the protections offered by such partnerships need be no more than merely 'adequate', are based on finding a *lack* of consensus on those matters. That stance means that discrimination on grounds of sexual orientation has found a place under the ECHR, on the basis that it is culturally accepted in a number of contracting states, especially those in which socially conservative religious groups are dominant. Although that can readily be said of states under the jurisdiction of the Inter-American Court of Human Rights, it has not allowed such discrimination to influence its findings on this matter, as discussed above. Despite this, Strasbourg Court has significantly contributed to the recognition of the rights of same-sex couples within Europe *and* in the international human rights community in general, including the ACHR. The IACtHR's Advisory Opinion, while securing extremely rapid progress in certain states, such as Costa Rica, has been rejected by

[96]Ibid, at [95].
[97]*Shalk and Kopf v Austria* (2011) 53 EHRR 20.
[98]*Fedotova v Russia*, nos. 40792/10, 30538/14 and 43439/14 ECtHR [GC] (17 January 2023).
[99]Advisory Opinion OC-24/17 Requested by Costa Rica.

other jurisdictions. That outcome might be seen by some as justifying the cautious approach of the ECtHR, which has avoided a possible undermining of its authority which might have occurred had it evinced a commitment to finding a right to same-sex marriage.

The credibility which the Strasbourg Court's institutional structures, breadth of jurisprudence, and almost constitutional court-like status has achieved in many of the member states, have enabled it to achieve significant influence over legal developments aiding the widespread acceptance of same-sex registered partnerships. Nevertheless, while recognising that the two Courts are not in the same position in terms of their authority and influence, this article concludes that reliance on consensus analysis in this context has had a detrimental impact on the Strasbourg jurisprudence in terms of upholding the principle of non-discrimination, an impact that can be traced to discriminatory stances taken in a number of the ECHR-contracting states towards same-sex unions.

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Legislation

ECHR (European Convention on Human Rights)

Article 1: Obligation to Respect Human Rights
Article 8: Right to Respect for Private and Family Life
Article 9: Freedom of Thought, Conscience and Religion
Article 12: Right to Marry
Article 46: Binding Force and Execution of Judgments

ACHR (American Convention on Human Rights)

Article 1: Obligation to Respect Rights
Article 11: Right to Privacy
Article 24: Right to Equal Protection

Cayman Isles

The Cayman Islands Constitution Order 2009, SI 2009/1379.
Schedule 2: Bill of Rights, Freedoms and Responsibilities
Civil Partnership Law (2020)
Marriage Law (2010 Revision)
Section 2: Definitions

Bermuda

Bermuda Constitution Order 1968, SI 1968/182
Schedule 2: The Constitution of Bermuda
Domestic Partnership Act 2018
Section 53: Clarification of the Law of Marriage
Human Rights Act 1981
Section 2: Interpretation
Section 5: Provision of Goods, Facilities and Services

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Dudgeon v UK, no. 7525/76 ECtHR(22 October 1981)
Eweida v United Kingdom (2013) 57 EHRR 8
Fedotova v Russia, nos. 40792/10, 30538/14 and 43439/14 ECtHR [GC] (17 January 2023)
Goodwin v United Kingdom (1996) 22 EHRR 123
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Hirst v United Kingdom (2006) 42 EHRR 41 [GC]
Maymalukhin and Markiv v Ukraine, no. 75135/02 ECtHR (1 September 2023)
Koilova and Babulkova v Bulgaria, no. 4020/14 ECtHR (5 September 2023)
Modinos v Cyprus, no. 15070/89 ECtHR (22 April 1993)
Norris v Ireland, no.10581/83 ECtHR (26 October 1988)
Oliari v Italy (2015) 65 EHRR 957
Orlandi et al. v Italy, nos. 26431/12, 26742/12, 44057/12 ECtHR (14 December 2017).
Przybyszewska et al. v Poland, no. 11454/17 ECtHR (12 December 2023)
RH v Austria, no. 7336/03 ECtHR 61 (19 January 2006)

Schalk and Kopf v Austria (2011) 53 EHRR 20
Sunday Times v UK (1979) 2 EHRR 245
Vallianatos v Greece (2014) 59 EHRR 12

UK Privy Council

Attorney General (Bermuda) v Ferguson and others [2022] UKPC 5
Day and another v The Governor of the Cayman Islands and another [2022] UKPC 6

IACtHR (Inter-American Court of Human Rights)

Atala Riffo and daughters v Chile, IACtHR, Series C, 239 (2012)
Duque v Colombia, IACtHR, Series C, 310 (2016)

Bermuda

Ferguson et al. v Attorney General (Bermuda) [2018] SC (Bda) 45 Civ
Godwin and DeRoche v Registrar General and others [2017] SC (Bda) 75 Civ

Cayman Islands

Day v The Governor of the Cayman Islands and others, Civil Cause nos. 111 & 184 of 2018
Day and Bodden-Bush v Deputy Registrar of the Cayman Islands and another, CICA No. 9 of 2019 (7 November 2019)

USA

Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al., 576 US (2015)

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Artificial Intelligence and the Labour Market: Impacts and Issues

*By Roberta Caragnano**

The authoress examines the impacts and issues that artificial intelligence produces on the labour market characterised by an increasing hybridisation of both the workplace and work performance. The European AI Act Regulation is analysed for issues of interest. Issues concerning monitoring systems to avoid discrimination (especially for women) as well as issues related to algorithms are reviewed. The authoress also analyses issues concerning redistributive and fiscal policies and the type of employment that AI will produce in the labour market. Finally, reflections are posed on the relationship between demographic decline and new technologies and the need for participatory industrial relations, with a central role played by collective bargaining.

Keywords: *Artificial intelligence; Labour market; Discrimination; Industrial relation; Collective bargaining*

Introduction

In the current economic-organisational scenario, which is characterised by an increasing hybridisation of the work world[1], the effects being produced are both on the 'workplace', understood in the narrow sense, and on job performance placed in the new scenario of digitisation[2] and artificial intelligence.

According to data released in 2024 by the International Monetary Fund, "40 percent of jobs worldwide could be affected by the rise of artificial intelligence, with high-income economies at greater risk than emerging markets and low-income countries"[3] and with effects that could generate inequality and social tensions.

The World Economic Forum's Future of Work Report 2023, for example, shows that until 2027 there will be a steady growth of job profiles including cybersecurity analysts, machine learning and artificial intelligence specialists, but also robotic engineers, to name a few.

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[1]On the hybridisation of labour and business organisational models see Rullani & Rullani (2018); Rullani (2004); Perulli (2021).

[2]On the effects of digitisation on work organisation, see Schwab (2016); Mckinsey Global Institute (2017); Degryse (2016); Valenduc & Vendramin (2016).

[3]So in Chimenti (2024).

So while we see the emergence of new job profiles, then again there is also a problem in terms of tasks. The main challenge of the digital transition is always in training to retrain the workforce.

In the same direction are the studies the Economist's study reports on the future of work - from *The future of work: A bright future for the world of work. Robots threaten jobs less than fearmongers claim.*[4] Note this trend, which is inducing states on several fronts to put legislative actions towards innovation in place[5].

Governments, therefore, are called upon to legislate to regulate the new cases related to the employment relationship and its framing, keeping in mind the fundamental rights of legal systems in a process of change, and put policy and regulatory actions in place to better manage transitions.

In this context, it is important that the relationship between technological change and labour be observed from different perspectives, not only in terms of quantity and quality of employment but also in terms of skills, training, industrial relations, collective bargaining, and new labour organisation.

Paradigm change[6]: If up till now the digital world was considered one of the important opportunities to be seized, today it is a critical success factor at the top of the priority list of any company aiming to be competitive in the market. Labour law is intervening on several fronts to protect the demands of workers, labour (and organisational) flexibility to enable the conversion of current jobs into as many new jobs, and the demands of businesses to avoid the mismatch between skills required by the market and skills possessed by the workforce.

The European AI Act Regulation

In order to assess the impacts of artificial intelligence on various sectors, the European Parliament approved the first European regulation in the course[7] of which it analysed not only the risks but also the positive effects of artificial intelligence for the EU's economic growth.

On May 21, 2024, it was approved by the European Council (on March 13, 2024, the act had been approved by the European Parliament) of the AI Act, the European Regulation[8] that aims to provide a harmonious European framework on the world of artificial intelligence signifying by the great push of digitisation, but at the same time able to guarantee the rights of citizens, workers and consumers. On this basis, Regulation 1689/2024, published in the Official Journal of the Union on July 12, 2024, follows in the footsteps of the European Commission's

[4]See Report Economist (2021).

[5]For more details see Caruso & Zappalà (2021).

[6]For more details at Caragnano (2023a).

[7]Back in 2019, the European Union-with an initial investment of €20 million from the Commission-launched the AI4EU project to create a European AI on *Demand-Platform*. The goal was to develop a European artificial intelligence ecosystem, bringing together available knowledge, algorithms, tools and resources in order to develop a central European strategy that would also lead to ground rules on a topic of great interest and impact on markets, economies and people's lives.

[8]The first proposal for a European Regulation was presented by the European Commission on 21 April, 2021.

White Paper on Artificial Intelligence - A European Approach to Excellence and Trust (COM(2020) 65 final), and other EU acts[9] that have followed in recent years whose aim is to define and restrict the fields of application of digitisation in the relationship with the networked circulation of data, which is increasingly affecting the institutions.

The rationale behind the AI Act - which is divided into four risk categories (unacceptable, high, limited, and minimal) for security and people's rights - is to create a common regulatory framework for states, including implementation timeframes (in individual member states) ranging from 6 to 36 months.

The Regulation for the values that inspired the constitution of the European Union aims to - create a single market with harmonised rules for artificial intelligence in order to facilitate the free movement and recognition of AI systems in compliance and in accordance with the EU's standards. Overall, the regulations aim at building AI literacy and introducing appropriate follow-up actions to improve working conditions, to raise awareness of the benefits, risks, safeguards, rights and obligations arising from the use of AI systems. To this end, the European Committee for Artificial Intelligence, in agreement with the Commission and member states, should cooperate with stakeholders to promote the development of voluntary codes of conduct to provide adequate training and literacy to all actors in the value chain.

Findings/Results

Artificial Intelligence and effects on the Labour Market

Artificial intelligence produces impacts on the labour market. This aspect is contained in the AI Act that highlights the need for all artificial intelligence systems to be transparent, reliable and accountable while respecting ethical principles and fundamental rights. The Act also stipulates that the rules are to be "people-centred, so that people can trust that the technology will be used safely and in accordance with the law, including in terms of respecting fundamental rights" while promoting innovation and employment.

Insofar as the subject matter of labour, employment and worker safety protection is concerned, the Regulations are without prejudice to existing law and the regulatory framework (international, EU and national of individual states)[10].

[9]Other community acts include the following: il *Digital Governance Act* 2023, il *Data Act* (DA) 2023, il *Digital Services Act* 2022, il *Digital Markets Act* 2022.

[10]The Regulations specify that "this Regulation should not affect national labour law and legislation on the protection of minors, i.e., persons under the age of 18, taking into account General Comment No. 25 of the Convention on the Rights of the Child (2021) on the rights of the child in relation to the digital environment, insofar as they do not specifically concern AI systems and pursue other legitimate public interest objectives" (thus in the Italian version Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence and amending Regulations (EC) No. 300/2008, (EU) No. 167/2013, (EU) No. 168/ 2013, (EU) 2018/858, (EU) 2018/1139, and (EU) 2019/2144 and Directives 2014/90/ EU, (EU) 2016/797, and (EU) 2020/1828 (Artificial Intelligence Regulation), 2021/0106(COD), Brussels, May 14, 2024.

The provisions of the Regulation must be read in a complementary manner to the specific regulations, it being understood that the new discipline is a corollary toward strengthening the effectiveness of the aforementioned rights to define specific requirements and obligations regarding transparency, technical documentation and record keeping of artificial intelligence systems.

The Regulations, moreover, highlight the need to monitor AI systems to avoid discrimination both in the management of labour relations (both subordinate and self-employed, both public and private) and in the access, selection, promotion, and termination of contractual labour relations; an area, this one, considered high risk.

One high-risk sector is social assistance for the management and delivery of essential services and benefits (public and private) and social security benefits such as sickness, accidents, maternity and leave, old-age and loss of employment pensions along with the major issue of housing assistance[11]. In these areas, it is the Public Authorities that provide the delivery of services. Even then, it is necessary to make use of compliant and secure artificial intelligence systems that are based on neutral algorithms, just as it is important not to make use of systems that invade people's rights and freedoms as well as personal security statuses and standards pertaining to the workplace.

The obligations to inform and consult workers and their representatives - referred to in Directive 2002/14/EC of the European Parliament and of the Council of March 11, 2002, establishing a general framework for informing and consulting employees[12] remain unchanged with respect to decisions that organisations intend to make regarding the use and deployment of artificial intelligence systems. These obligations are also incumbent upon deployers[13] of high-risk artificial intelligence systems, who keep logs automatically generated by such systems[14].

Discussion

Strengths and Weaknesses: New Jobs, Redistributive Policies, Algorithms

The study published in June 2023 by the European Parliament *What are the risks and benefits of artificial intelligence* showed that while the automation of jobs (amounting to 14% of current ones) in OECD countries may affect the reduction of jobs, it will also create new ones, while 32 percent of current ones will face substantial changes.

[11]For an overview of the issues see Ferrera (2022); Jessoula, Raitano & Pavolini (2021); Saraceno, Benassi & Morlicchio (2020); Ferrari (2000); Giannini (1977).

[12]On the important role of Directive 2002/714/EC, which aims to provide a unified understanding of information and consultation rights, see Nogler (2008). More generally, on the rights in question and the importance of the 1989 Community Charter, which is a solemn declaration without binding force see Arrigo (2001); Guarriello (2003); Manzella, Melograni, Paciotti & Rodotà (2001).

[13]As clarified in the Regulations, deployers are financial institutions subject to requirements on governance, arrangements or internal processes established under Union financial services law and retain logs as part of the records maintained under relevant Union financial services law.

[14] See Article 26 of the European Regulations

It follows that the scenarios that artificial intelligence is opening up are different than current ones. Such new scenarios force companies to review organisational and business models as well as jurists and doctrine[15] to question the prospects for managing labour relations[16].

A first issue that arises is that inherent in both redistributive and fiscal policies, which need to be attended to in order to avoid the risk of inequality[17].

Although business adoption of artificial intelligence is still relatively low, rapid advances are on the brink of a true digital revolution (including with generative artificial intelligence, such as ChatGPT) together with falling costs and the increasing availability of workers with skills in the field warn OECD countries, are on the brink of a true digital revolution.

More to the point and for the sake of completeness, it should be noted that while artificial intelligence consists of the ability of a technology to replicate human intelligence based on information provided by an algorithm, "generative" artificial intelligence complements traditional artificial intelligence by adding Machine Learning and Deep Learning techniques to generate new data.

Therefore, the OECD calls for a pro-active role for governments to ensure that states' policies guarantee respect for fundamental rights and support inclusive labour markets that facilitate skill integration.

The issue of artificial intelligence must be at the centre of the dialogue between Governments, stakeholders, the world of institutions, businesses and civil society.

What emerges is that these are work and organisational models[18] in which there is a kind of morphological change in the employment relationship in which intelligent robots interact with their surroundings and with humans, by whom they are often "educated."

Another issue that emerges is that related to the use of algorithms in both personnel selection processes, human resource management processes and in relation to the definition of career plans and, therefore, the related problems of discrimination that could arise. Added to this is the risk of inequalities between companies capable of investing in artificial intelligence and those more "fragile" due to lack of resources, which also affects competitiveness and labour costs.

Regarding algorithms, algorithmic management assumes relevance as it refers to automated decision-making systems in which there is no human correction. This, however, can lead to distorting effects or otherwise alter perceptions both with regard to the replacement impact of human labour and with regard to the creation of new employment and in the complementary relationship with artificial intelligence[19].

[15]On the bursting consequences of the impact of artificial intelligence on the sociological and legal categories of labour and worker see Caruso (2019).

[16]For a reflection on the freedom of work in the digital age and the transformations of work performance due to the advent of technology see Bavaro (2021).

[17]Tolan, Pesole, Martínez-Plumed, Fernández-Macías, Hernández-Orallo & Gómez (2021).

[18]See the Lee (2008) report.

[19]See Gaudio (2022)

On this point, the joint study by the European Commission, Joint Research Centre (JRC) and International Labour Organisation (ILO), *Algorithmic Management Practices in Regular Workplaces: Case Studies in Logistics and Healthcare*[20], which examines the effects of algorithmic management in the logistics and healthcare sectors, shows that while there is an improvement in production efficiency as a result of rationalisation and simplification of processes, there is also the problem of worker surveillance.

In addition, the analysis of the impact of artificial intelligence on employment is affected by varying aspects and facets depending also on employment contexts, territories, and social groups[21].

It can be reasonably assumed that there will be different effects in cases where artificial intelligence intervenes to replace or automate processes, creating a problem of social magnitude.[22] This can lead to cyclical unemployment until new skills for workers are developed, or until an increase in productivity is fostered. Conversely, situations with the complementary effect on human labour will affect the well-being of the worker who can "free up" work time to devote to reconciliation.

Training will play a key role to the extent that there is a redistribution of skills and an adaptation of skills that requires both investment in training and retraining programs, and the adoption of policies capable of fostering occupational mobility and transition to new and emerging sectors.

The Gender Dimension: Stereotypes and Algorithms dictated by Artificial Intelligence

The UNESCO report, *The effects of AI on the working lives of women*[23], prepared with the collaboration of the Inter-American Development Bank and the Organization for Economic Cooperation and Development (OECD), highlighted how artificial intelligence can improve job search methods and services[24] while also reducing the impact of gender stereotypes that create barriers in accessing work.

However, with respect to the problems that will have to be faced by employment centres, it is crucial, in the construction of algorithms[25], to parameterise artificial intelligence engines in a "neutral" way so that they do not adapt to languages, contract types, aptitudes or personal data (On the privacy point, it is important to delete unnecessary data that can produce distorting effects.) while preserving ethical standards.

UNESCO's study, *Bias Against Women and Girls in Large Language Models*[26], and The Guardian's investigation, "'There is no standard': investigation

[20]Authored by Rani, Pesole & Gonzalez Vazquez (2024). The study compares two European countries (Italy and France) and two non-European countries (India and South Africa).
[21]For a detailed analysis see Lane & Saint Martin (2021).
[22]Simoncini (2018); Garofalo (2019); Kaplan (2017).
[23]Unesco, Oecd, Idb (2024).
[24]In this sense see also Urquidi & Orega (2020).
[25]Adams-Prassl (2019); Jarrahi, Newlands, Lee, Wolf, Kinde & Sutherland (2021).
[26]Unesco (2024).

finds AI algorithms objectify women's bodies"[27] , have found how worrying the risk of gender bias is."

According to the United Nations Educational, Scientific and Cultural Organization, there is a tendency for large language models[28] to produce gender stereotypes and biases. Women are often described as much as four times more than men as domestic workers or cooks and are often associated with words such as family, children, maid while men are ascribed the words career, executive, business, doctor.

With respect to linguistic patterns, there are fears of the risk of spreading discrimination more widely if such patterns are not carefully constructed; in the background is the spectre of standardizing more vulnerable social groups and categories. The report, *Multimodal datasets: misogyny, pornography, and malignant stereotypes*[29], which analysed the datasets with which algorithms are trained based on the most common linguistic patterns, has confirmed a real labelling of sets with built-in discrimination and prejudice.

Productivity and Wages

A further aspect that emerges in the general scenario of a yet unclear and ambiguous position oscillating between pessimistic and more optimistic studies[30], is the issue of productivity, which is at the centre of political and academic debate, also in the consulting world.

While the study reports of the world's largest companies, such as McKinsey[31], Accenture[32], and PWC[33] and a part of academia consider artificial intelligence to be an accelerator that can increase productivity, a part of the literature has pointed out that there is no empirical data to confirm this. In fact, it seems the opposite is true. In this vein, both Gordon[34] and Acemoglu and Restrepo[35], in their 2018 studies, note that there is a progressive reduction in the demand for labour in which the substitution effect of significant shares of cognitive labour occurs.

The reduction in demand also brings with it a reduction in supply in a scenario in which there may be a mismatch between capital and profitability inevitably leading to a reduction in wages, even when productivity is created in some sectors[36] and areas. This effect, however, is not unique or absolute but is

[27]Gianluca & Schellman (2023).

[28]These are deep learning models of considerable volume, which are set up to receive and analyse large amounts of data through systems that extract meanings from a sequence of text and define relationships between words and phrases in it.

[29]Birhane, Prabhu & Kahembwe (2021).

[30]On this point for an initial reasoned review of the literature see Dagnino (2024).

[31]Mckinsey & Company (2019).

[32]Accenture (2017).

[33]Pwc (2018).

[34]Gordon (2018).

[35]Acemoglu & Restrepo (2018).

[36]A number of studies by Fossen and Sorgner prepared on the basis of a Survey targeting entrepreneurs and workers point out that "exposure to AI advances would be associated with greater job stability and wage growth, projecting, at least so far, a use of AI that complements, rather than replaces, human labor," so in Marciano (2021). For the detailed study see Fossen & Sorgner (2022).

influenced by multiple economic and social cyclical variables that can shift and/or steer the axis.

As for productivity growth, most recently the PWC 2024 report highlighted a five-fold increase in labour productivity among which were consulting services, information technology and financial services in sectors affected by artificial intelligence, as compared to sectors with lesser AI integration.

The central issue, however, is not only the effect resulting from the increase in productivity sic et simpliciter, but more importantly the distributional effect that is generated with respect to the number of hours worked and the resulting employment with respect to the relationship with total factor productivity and GDP.

The National Bureau of Economic Research's 2024 study, titled *Scenarios for the Transition to AGI* analysed how output and wages behave under different scenarios of technological progress. The assumption is that human labour can be decomposed into atomistic tasks that differ in their complexity. Additionally, technological advances make increasingly complex tasks easily automated. The effects on wages depend on a race between automation and capital accumulation, which may bring about different likely scenarios.

Conclusion

From the analysis conducted thus far, it appears that every technological advance impacts the labour market. It is therefore crucial to understand the relationship between worker replacement, skill obsolescence, and the advent of automation models.

Government policies, therefore, must be able to meet the challenges, confront technological change and put in place actions and proposals. The social partners, particularly labour unions through collective bargaining, must be able to govern change and mitigate its risks.

The paradigm shift, therefore, is not only t technological and cultural but also legal, inevitably passing through the new role of unions and collective bargaining with effects that are gradually taking place in our legal system as well. An example would be the debate that has developed in America around the professions of actors[37] that has been manifesting in our country as well.

Likewise, it is essential to intervene in labour policies linked to training policies in order to design methods that meet people's training needs on the one hand, and the modernisation needs of businesses on the other, in a context of building integrations within the territory. The rationale behind this is to strengthen and stimulate relations between the world of education and business. Central to this is the role played by Competence Centres that connect technological advancement and universities with large and small businesses.

In the background is the need to focus on participatory industrial relations that are innovation-friendly and strategically oriented toward cooperative-participatory systems that can also enable the recovery of inflation and labour productivity.

[37]For an initial commentary on the U.S. agreement, see Caragnano (2023b).

Overall, moreover, there is a further issue, namely that of demographic decline in relation to new technologies; an issue that needs to be analysed because of the legal as well as its sociological and economic implications.

While, in fact, there is the advantage of prolonging life expectancy as a result of improved well-being, at the same time there is an impact on the health and pension system with significant effects to the extent that there is an increasing reduction of young people entering the labour market along with a real decline in the birth rate. Italy, for example, according to ISTAT data[38], will have a population of 51 million in 2050 and if the trend is not reversed, the debt/GDP ratio in 2070 could reach 220% - a worrying figure.

From an overall analysis including that of the trends determined (over the years) by technological innovation on productivity, it emerges that artificial intelligence could be a tool that could stem the smaller number of workers that are in the system due to the effect of the demographic decline by leveraging the automation of production processes, and thus workflows and increasing work efficiency. This could have balancing effects for some countries such as Italy. The Deloitte AI Institute's 2024 study, Deloitte State of Generative AI in the Enterprise: Now Decides Next found that declining demographics can be more effectively addressed by businesses investing in artificial intelligence in order to optimise production processes and generate positive efficiency impacts.

It follows that the key to countering the effects of an aging population is certainly the retraining of workers, and artificial intelligence can be a useful tool. Just imagine virtual assistants in the service sector, medicine and telemedicine, and the use of drones and sensors in agriculture. States, however, need to identify "compensatory" actions starting from a European regulatory framework that also intervenes on a unified and systemic vision of immigrant integration, with respect to the flows of foreign workers and their bility to contribute to the growth of different country systems.

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[38]ISTAT (2021).

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Exploring Scope of Regional Legal Education Discourse for Students from SAARC Member States

By Geeta Oberoi[*]

Technology has made physical borders meaningless and consumers of justice are no more interested in adhering to the barriers created by political masters for their governance. They want to move to the forum where they will be heard, cared for and provided free access to justice. Where their disputes will be resolved in time with logical, legal and scientific precision. In this new world of open and borderless cyberspace, it becomes all the more important to explore the possibilities of designing a regional level legal education discourse leading to award of the degree to practice law at regional level in South Asian countries that are part of the SAARC block. This article makes an attempt to explore the benefit of such regional legal education discourse for consumers of justice in the SAARC block who share common legal traditions, cultures, and who have in the past shared common colonial legacy.

Keywords*: Legal education quality, SAARC, access to justice, cooperation in area of education, South Asian University, curriculum, legal practice*

Introduction

The South Asian Association for Regional Cooperation (SAARC) was established with the signing of the SAARC Charter in Dhaka on 8 December 1985. SAARC comprises of eight Member States: Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka. The Secretariat of the Association was set up in Kathmandu on 17 January 1987.[1] The objectives of the Association are: to promote the welfare of the peoples of South Asia and to improve their quality of life; to accelerate economic growth, social progress and cultural development in the region and to provide all individuals the opportunity to live in dignity and to realize their full potentials.[2] SAARC also aims to strengthen cooperation with other developing countries and to cooperate with international and regional organizations with similar aims and purposes. SAARC Heads of State meet at annual Summits and even in between. SAARC Secretariat has been in the past designing and executing a regional level fund to foster the cooperation among its member states.[3] Recent

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[1]Nair, Rejtha. (2013). Educational services in saarc: case for deeper integration. *Nirma University Law Journal*, 3(1), 19-50

[2]Chanda, Rupa. (2011). INTEGRATING SERVICES IN SOUTH ASIA - TRADE, INVESTMENT AND MOBILITY. Oxford University Press. 228.

[3]K. Das, Debendra. (1992) (Ed.) SAARC: REGIONAL CO-OPERATION AND DEVELOPMENT PERSPECTIVES, PROBLEMS AND POLICIES. New Delhi.

such example being: SAARC Covid-19 emergency fund, amounting to around 22 million USD.[4]

Co-Operation in Area of Education

The SAARC member states have given special attention to enhance the level of literacy in the region by promoting the quality of education. During the Second SAARC Summit (Bangalore, 16-17 November 1986), the Heads of member states reiterated importance of increasing involvement of their people for regional co-operation. For the same, the member states agreed to promote greater contacts among the peoples of the region through regular and frequent interchange of scholars, academics, artists, authors, professionals and businessmen as well as facilitation of tourism. At the Third Summit (Kathmandu, 02-04 November 1987), the leaders fixed the dates for the institution of the SAARC Chairs, Fellowships and Scholarships among SAARC member states to promote the educational facilities in the SAARC region. During the Fourth Summit (Islamabad, 29-31 December 1988), the leaders decided that to include Education as area of cooperation since it is the principal means of human resources development.[5] The member states agreed to give children the highest priority in national development planning. The Leaders at the Ninth Summit (Malé, 12-14 May 1997) agreed to share best practices in area of new and innovative methods like Open Learning and Distance Education. Accordingly, the leaders agreed to utilize the institutional facilities in such education available in the region on a regional scale.[6] They also agreed to explore the possibility of the creation of a Consortium of Open Universities in the region. At the Eleventh Summit (Kathmandu, 04-06 January 2002), the Heads of States recognized the access to quality education as an important element for empowering all segments of society, and to develop or strengthen national strategies and action plans to ensure that all children, particularly the girl child, have access to quality primary education by 2015; and to improve levels of adult literacy by fifty percent by eliminating gender disparities in access to education as envisaged in the Dakar Framework for Action on Education for All adopted by the World Education Forum held at Dhakar in April 2000. At the Thirteenth SAARC Summit (Dhaka, 12-13 November 2005), the leaders stressed on challenges of the twenty-first century, and how the SAARC member states must make important strides in the areas of science, technology and higher education. In this meeting, India proposed to create a Centre of Excellence, in the form of a South Asian University (SAU), which can provide world class facilities and professional faculty to students and researchers drawn from every country of the region. The

[4]http://indbiz.gov.in/india-proposes-covid-19-emergency-fund-for-saarc/ [Last visited on 20 September 2024]

[5]Memorandum of Understanding Among the Governments of the SAARC Member States on the Establishment of the Secretariat [notes] (1993). *Asian Yearbook of International Law*, Vol. 3, pp. 476-480

[6]Kathmandu Declaration of the SAARC. (2003-2004). *Asian Yearbook of International Law (Brill)*, Vol. 11, Issue 1: 361-374

Expert Group Meeting to finalize the modalities for establishing the SAU was held in March 2007 in New Delhi and the first meeting of the Inter-Governmental Steering Committee on the establishment of SAU was held in May 2007 in New Delhi. The Heads of State in the Eighteenth Summit (Kathmandu, 26-27 November 2014) expressed their resolve to ensure quality education in all institutions by reforming curricula, teaching methods and evaluation systems adequately supported by physical, technical and other facilities. The leaders agreed to promote regional cooperation in the field of vocational education and training. The leaders directed their Education Ministers to develop a *Regional Strategy for Enhancing the Quality of Education* in order to raise the standards of South Asian educational institutions in the region.

South Asian University (SAU)

Pursuant to resolution in 13th SAARC Summit held in November 2005 in Dhaka to establish SAU – a regional Centre of Excellence, about 6 meetings took place at different places and finally the University got its shape, with the rules providing its funding modality, draft statutes, academic structure, business plan, rules, regulations etc. The SAU has so far been one concrete and major achievement of SAARC. The first academic session of SAU commenced on 26 August 2010 with an intake of 50 students in MA (Development Economics) programme and MCA (Master of Computer Applications) programme. In its second year of functioning, SAU had 156 students enrolled for Masters' Degrees in Development Economics, International Relations, Sociology, Law, Biotechnology and Computer Science. For its third academic year (2012- 13), SAU began admissions through common entrance examination. Today, the SAU offers both post-graduate and doctoral programs in Development Economics, Computer Science, Biotechnology, Mathematics, Sociology, International Relations and Law.

From 2011 until 2016, the SAU had held 8 Governing Board meetings attended by the members from all eight member states of SAARC. Today, the SAU is functioning from its 100-acre campus in Delhi. The heads of participating states have been looking forward to the SAU to commence the regional level undergraduate studies for its students. The professional undergraduate courses (in medicine, law, engineering) will definitely need local recognition from the regulators as well as all eight member states of SAARC will have to take steps for the validity of degree courses by legislating appropriate legal and regulatory measures for the recognition of SAU professional degrees in their nation state.

Need for Undergraduate Courses in Law and Justice

Poddar calls out the state of legal professionalism in South Asian countries. By comparing legal education in south Asia with that of Canada and USA, he points out how legal education in west has done away with bankruptcy of common law legacy and how the west went on to develop their own legal system and how

the legal profession over there have made so many advancements in court craft. He cites an identity crisis and systemic subversion of legal education in south Asia. He opines that legal profession in south Asian public perception has been reduced to one producing parasites in south Asian countries.[7] Whether or not we chose to agree with these crude observations, but it is definitely worth exploring for some semblance of truth around it. And for the same, it is important that we take a look at the big picture of what is offered as legal education in different member states of SAARC.

Comparative Table Analysis[8]

INDIA	PAKISTAN	AFGHANISTAN	BANGLADESH	BHUTAN	NEPAL	SRI LANKA	MALDIVES
3 years LLB	3 years LLB	4 years LLB by Rana University Afghanistan	4 years LLB by State University	5 years LLB by JSW law school	3 years LLB	3 years LLB course offered by UK colleges in Sri Lanka	3 years LLB Mandhu College
SEMESTER 1	**PART 1**	**SEMESTER 1**	**SEMESTER 1**	**SEMESTER 1**	**PART 1**	**PART 1**	**PART 1**
Jurisprudence	Islamic Jurisprudence	Fundamentals of political science	Ethics and Esthetics	Grammar	Jurisprudence	Contract Law	Constitution1
Law of contract	English Jurisprudence	Fundamentals of economics	English for Law	Vocabulary	Procedural Law	Constitutional Law	Jurisprudence and theories of law
Law of Torts	Constitutional Law 1 (British and US Constitution)	Fundamentals of law	Art of Performance & Creative Art	Economics	Public International Law	Foundations and Independent Learning	Law of contract 1
Law of Crimes -IPC	Law of Contract (Contract Act 1872, Sale of Goods Act 1930)	Fundamentals of sociology	Law of Contract	Philosophy	Constitutional Law	Law of Torts	Criminal law 1
Family Law-1	Torts and Easement (Easement Act 1882)	International organizations	Constitutional Law of Bangladesh	Legal composition and rhetoric	Law of Contract	Criminal Law	Criminal law 2
SEMESTER 2	Criminal Law (Pakistan IPC 1860)	Islamic studies	**SEMESTER 2**	Tort law	Two optional out of: Family Law Media Law Administrative Law Taxation Law International Trade Law Law of Torts Juvenile Justice Fiscal Law	Law in Society	Common law 1
Law of Evidence	**PART 2**	Contemporary history of Afghanistan	Bangladesh Studies	**SEMESTER 2**	**PART 2**	**PART 2**	Common law 2
Family Law -2	Constitutional Law 2 (Pakistan only)	Political history of the world	Law of Tort, Equity and Trust	Nyen-ngag	Criminal law	Justice, human rights and the state	**PART 2**
Law of Crimes – Code of Criminal Procedure	Equity (Trust Act 1882, Specific Relief Act 1877)	Fundamentals of Islamic Law 1	Jurisprudence	Bhutan legal history	International Institutions and Human Rights	Equity and trusts	Land & Property 1
Property Law	Mercantile Law (Partnership Act 1932, NI Act 1881, Companies Act 2017)	**SEMESTER 2**	Personal Law – I (Muslim)	Human dignity	Property Law	Law of the single market of the EU	Land & Property 2
Public International Law	Transfer of Property (TPA 1882, Registration Act 1908, Succession	Philosophy of worship	Computer Application	Political science	Moot Court, Pre-trial preparation and participation in trial	Land law	Law of Tort 1

[7]Poddar, Debasis. (2022). Comparative Sociology of the Law Profession. *Dharmashastra National Law University Law Review* (DNLULR), 1(1), 14-45

[8]See generally, SYLLABUS available on website of Delhi University, Dhaka State University, Lahore University of Punjab, Rana University of Afghanistan, JSW Law School of Bhutan, Kathmandu Law School, Mandhu College of Maldives and Colombo University.

	Act 1925, Land Acquisition Act 1894)						
SEMESTER 3	Muslim Personal Law (Guardian and Wards Act, Dissolution of Muslim Marriage Act 1939)	Contemporary legal systems	**SEMESTER 3**	Legal writing and research	Methods of legal research and writing	Any one of option: International human rights International trade law Clinical legal education 1 Maritime law Environment law	Law of Tort 2
Constitutional law -1	Public International Law	General constitutional law	Personal Law- II (Hindu, Christian & Others)	Contract law	Evidence Law	**PART 3**	Evidence 1
Code of Civil Procedure and Limitation Act	Special and Local Laws	General administrative law	Legal History and Legal System in Bangladesh	**SEMESTER 3**	Two options out of - Labour law - Election law - International air and space law - Environment law - Refugee law - Criminology and penology - Gender and inclusive justice - Law of insurance	Dissertation	Evidence 2
Special Contract	**PART 3**	History of foreign relations of Afghanistan	Interpretation of Statutes and General Clauses Act	Chen-ju	**PART 3**	Clinical legal education 2	Equity and trusts
Moot Court Mock Trial and Internship	Law of civil procedure (CPC 1908, Limitation Act 1908)	History of political thought in the west	Labour and Industrial Law	Penal law and restorative justice	Comparative law and Nepalese legal system	Mediation skills and practice	Islamic Sharia'1
SEMESTER 4	CrPC and Medical Jurisprudence (CrPC 1898)	English language 1	**SEMESTER 4**	Jurisprudence and statutory interpretation	Interpretation of statutes	Employment law	**PART 3**
Constitutional law -2	Evidence and legal ethics	Fundamentals of Islamic Law 2	English for Professional Purpose / Art of Public Presentation	International law	Professional ethics and lawyering skills	Commercial law	Company law
Administrative law	Drafting, pleading, conveyance and interpretation of statutes	Administration and management	Land Laws of Bangladesh	Civil and criminal procedure	Company law	Company & business organizations law	Maldivian legal system
ADR	Administrative Law and Service Laws	**SEMESTER 3**	Criminal Law –I	**SEMESTER 4**	Seminar	Negotiation skills and practice	Constitution of Maldives
Labour Law	Minor Acts (Stamp Act 1899, Suit Valuation Act 1887, Court Fees Act 1870, Arbitration Act 1940)	Peace and conflict resolution	Law of Registration & P D R Act	Logic and debate	Law of the Sea and International rivers	Mooting	Family law
SEMESTER 5	Labour and Taxation	Biography of M.P.U.H	Law of Transfer of Property	Oral advocacy and logic	Two options out of -banking and negotiable instruments - private international law - IPR - population law - victimology - cyber law	International law, peace and security	Islamic Sharia 2
Company law	**FIVE YEAR LLB**	Obligations law	**SEMESTER 5**	Environment law	**5 years BALLB**	Evidence	Taxation
Drafting, Pleading and Conveyance	**SEMESTER 1**	General criminal law 1	Law of Civil Procedure-I	Property law	**SEMESTER 1**	Civil dispute resolution	Commercial law
Industrial Law	English 1	Criminal law of Islam	Law of Criminal Procedure -1	Bhutanese history and metaphysics	Legal Method	Jurisprudence	Human rights
SEMESTER -6	Political science 1	Afghanistan Constitutional Law	Business Law	**SEMESTER 5**	Legal Nepali-I	IPR	
Professional Ethics and Accounting System	Sociology 1	History of political thought in the East	Criminal Law- II	Legal drafting, correspondence, conveyance and	Alternative English (for Foreigner in Lieu	Clinical legal education 1	

				pleadings	Legal Nepali)		
Environment Law	Philosophy of law	English language 2	**SEMESTER 6**	Comparative constitutional law	Legal English-I	Clinical legal education 2	
Taxation	Islamic studies / Ethics	**SEMESTER 4**	Law of Criminal Procedure- II	Evidence	Political Science: Theory and Thoughts	**3 years LLB course offered by Sri Lanka Law College**	
ELECTIVE COURSES	**SEMESTER 2**	Islamic Moral System	Company and Partnership Law	Corporate law	History	**PART 1**	
SEMESTER 3	English 2	Comparative politics	Law of Specific Relief and Limitation	Moot court	Sociology and Anthropology	Legal history and legal systems of Sri Lanka, Roman Law	
Rent control and slum clearance	Political science 2	Research methodology	Law of Banking and Securities/ Criminology	**SEMESTER 6**	Economics-I	Criminal Law	
International institutions	Sociology 2	State building in post-war countries	**SEMESTER 7**	Administration law, Anti-corruption law etc	**SEMESTER 2**	Law of persons including personal laws	
Legal philosophy and theory of justice	World legal systems	General criminal law 2	Fiscal Laws	Bhutanese constitutional law	Jurisprudence-I	Constitutional law	
Legal research and writing	Pakistan studies	Human rights in international treaties and Islam	Law of Civil Procedure- II	Law, religion and culture	Constitutional Law-I	Industrial law	
SEMESTER -4	**SEMESTER 3**	Labour law	Legal Drafting & Conveyancing (Criminal & Civil)	ADR-1 (Negotiation)	Property Law	Law of obligations 1 (Contract)	
Private international law	English 3	Contemporary Islamic movements	Law of Evidence, Forensic Law and Scientific Evidence	Mock trial	Legal Nepali-II	Legislative drafting and statutory interpretation	
Interpretation of statutes	English jurisprudence 1	**SEMESTER 5**	**SEMESTER 8**	**SEMESTER 7**	Alternative English (For foreigner in Lieu of Legal Nepali)	Environment law or conflict of laws	
Media and law	Islamic jurisprudence 1	Political thoughts in Islam	Environmental Law	Law and gross national happiness	Legal English-II	**PART 2**	
Humanitarian and Refugee law	ADR	Pre-court proceedings	Public International Law	Professional responsibility and ethics	International Relations and Diplomacy	Law of property 1 & 2	
SEMESTER -5	Principles of British Constitution	Family law	Advocacy Skills and Legal Practice	ADR 2 (Mediation and Arbitration)	Economics-II	Law of obligations 2 (delicts)	
Information and technology law	**SEMESTER 4**	Special criminal law 1	Intellectual Property Law	IPR	**SEMESTER 3**	Jurisprudence	
Legislative drafting	Skills development	Commercial law	Cyber and Media Law	**SEMESTER 8**	Jurisprudence-II	Law of Trusts	
Criminology	English jurisprudence 2	General international law		Social enterprise clinic	Constitutional Law-II	Administrative law	
International trade law	Islamic jurisprudence 2	Criminology		ADR clinic	Evidence Law	International law or Revenue law or IPR or Construction law or Arbitration	
IPR laws -1	Human rights law	Criminalistics		Human dignity clinic	Criminal Law-I	**PART 3**	
Business regulations	US Constitution	**SEMESTER 6**		Bhutanese and international commercial law	Public International Law-I	Commercial Law 1 & 2	
SEMESTER -6	**SEMESTER 5**	Islamic Economic System		Family law	Legal Research Methodology	Civil Procedure and Pleadings 1 & 2	
IPR Laws -2	Constitutional history of Pakistan	Arabic Language / Law terminology		**SEMESTER 9**	**SEMESTER 4**	Evidence	
Insurance and Banking Law	Muslim personal law 1	Inheritance law		Social enterprise clinic	Criminal Law-II	Criminal procedure	
Election laws	Law of contract 1	Special criminal law 2		ADR clinic	Public International Law-II	Conveyancing	
Minor Acts and Supreme Court Rules	Law of torts 1	International commercial law		Human dignity clinic	Comparative Law	Trust accounts book keeping and Professional Ethics	
International Investment Law	Criminal law 1	Private international law		Law practice management	Family Law	Apprenticeship (6 months with lawyer)	
Competition Law	Public international law 1	International humanitarian law		**SEMESTER 10**	Contract Law-I	Practical Training Course (after	

						passing final exam)	
5 years BALLB	**SEMESTER 6**	Principles of jurisprudence		Internship	Procedural Law-I		
SEMESTER 1	Constitution of Pakistan	**SEMESTER 7**		Internship writing	**SEMESTER 5**		
English 1	Muslim personal law 2	General jurisprudential rules			Contract Law II		
Political science 1	Law of contract 2	Forensic medicine			Criminology and Penology		
Economics 1	Law of torts 2	Criminal psychology			Procedural Law II		
Sociology 1	Criminal law 2	IPR			Company Law and Governance		
Contract 1	Public international law 2	International criminal law			Any one of: - ADR - Juvenile delinquency - Election law - Cyber law - International Air and Space Law		
History 1	**SEMESTER 7**	History of Islamic civilization			**SEMESTER 6**		
Legal Method	Equity 1	Principles of civil procedure			Corporate Law and Management		
SEMESTER 2	Transfer of Property 1	**SEMESTER 8**			Nepalese Legal System		
Contract 2	Mercantile law 1	Defense Advocacy			IPR		
Torts & Consumer Protection	Special and local laws 1	Judicial approach			International institutions and Human Rights		
Constitutional Law 1	Environment laws	Objective law			Interpretation of Law		
Legal History	Research methodology and project	Media rights			Any one of: -Torts and consumer protection - insurance law - socio-economic crime - international humanitarian law		
Sociology 2	**SEMESTER 8**	Principles of criminal trials			**SEMESTER 7**		
English 2	Equity 2	Jurisprudence of priorities			Gender & Inclusive Justice		
Legal research and moot court	Transfer of Property 2	Monograph			Law, Poverty & Development		
SEMESTER 3	Mercantile law 2				Environment Law		
Family law -1	Special and local laws 2				Seminar 1 (doctrinal)		
Law of Crimes 1	Cyber laws				Labour law		
Constitutional Law 2	Moot cases and professional ethics				Any one of: - Forensic science - Fiscal law - Natural resources law - International refugee law		
History 2	**SEMESTER 9**				**SEMESTER 8**		
Economics 2	Civil procedure 1				Professional ethics and lawyering skills		
Political science 2	Criminal procedure 1				Moot court (civil case)		
SEMESTER 4	Law of evidence 1				Private international law		
Family law -2	Administrative law and service laws				Administrative law		
Law of Crimes 2	Labour and taxation				Clinical law – 2 (conveyancing)		
Administrative Law	**SEMESTER 10**				Any one of : International rivers and sea law Forensic medical Investment law Media law		
History 3	Civil procedure 2				**SEMESTER 9**		
Economics 3	Criminal procedure 2				Moot court 2 (criminal case)		

Political Science 3	Law of evidence 2				Banking and negotiable instruments		
SEMESTER 5	Legal drafting and interpretation of statutes				Legislative drafting		
Environment laws	Minor Acts				Taxation law		
CPC 1					Seminar 2 (non-doctrinal)		
CrPC 1					Any one of: - Energy law - Victimology - Population law - Competition law		
Human rights					**SEMESTER 10**		
ADR					Clinical law 3 (placement)		
Sociology 3					Social welfare and social work law		
Summer internship					International trade law		
SEMESTER 6					Dissertation		
Jurisprudence							
Evidence							
CrPC 2							
Property law							
CPC 2							
Public international law							
SEMESTER 7							
Labour law 1							
Competition Law							
Company Law							
Law and technology							
IPR 1							
Cluster 1: (chose 1) - Election laws - Socio-economic offences - Private international law - Law, poverty and development							
Summer internship							
SEMESTER 8							
IPR 2							
Interpretation of statutes							
Labour Law 2							
International Trade Law							
Income tax law							
Cluster 2: (chose any two out of) Criminology, victimology and penology Socio-political system in India Women and law International commercial laws Comparative constitutional law							
SEMESTER 9							
Legal ethics and court craft							
Drafting, pleading, conveyancing							
Land and Real Estate Laws							
Chose any 3 elective from cluster 3: - Banking, insolvency and insurance laws - Indirect tax laws - International organisations - Legal research and methods - Gender justice - Sports and media law - Health care laws - Right to information, vigilance and whistle blower protection - Public employment and service laws - Telecommunication laws - International							

- humanitarian law - Law and empowerment of marginalized people							
Developing entrepreneurial mindset							
Summer internship							
SEMESTER 10							
Dissertation							
Internship							

From the above table of curriculum of law graduation degrees in 8 member states of SAARC, we learn that India, Pakistan, Nepal are offering both 3 years LLB course after graduation as well as 5 years BALLB course after the finishing the school level education. Further, Afghanistan and Bangladesh offer 4 years LLB course after graduation. Bhutan has recently started its 5 years BALLB course after the high school. Both Sri Lanka like Afghanistan has many players in field of legal education (both domestic and foreign), but both nations are not offering as of yet the option of 5 years law graduation programme for its high school students. Maldives, as of present, is offering only 3 years LLB to its graduate students.[9] The curriculum table in no unclear terms demonstrates that the legal education regulators are lacking basic understanding on what subjects are to be taken for teaching at different stages of course. It also becomes apparent that apart from mis-match between subject and student level, there is also an urgent need to overhaul the syllabus to meet the present-day challenges in the region. Regional level initiatives at legal education reforms will do away with these variations in duration and offer standard options to pursue legal education either after completing school education or after graduation as per internationally ranked university norms. For the same, however, SAARC level meeting has to be called in and this aspect will have to be included as an agenda for consensus among law ministers and judges of all eight member states. Till date no such meeting amongst law ministers and judges for legal education discourse development has taken place even though master level and doctorate level legal education programmes are offered by SAU. The present leadership at SAU's law department has not taken any initiatives so far to push for such consensus among member states. Further, such initiatives will be successful only when every member state gets to participate in leadership roles. Not more than three years should be allowed to any one member state to assume leadership role in regional level legal education discourse at SAU if it has to be a successful and purposeful initiative.

How Regional Level Law Undergraduation Programme will benefit Saarc?

As a legal and judicial educator, I feel that the SAU's vision for undergraduate law school should be to prepare lawyers, judges, prosecutors, draftsperson, legal officers, court officers who can contribute from their own standpoint in creating a better, just, fair world. A law degree by the SAU cannot limit its scope to skills preparation, but larger picture of the subcontinent, the problems of subcontinent (poverty, inequality, climate change) have to be focused.

[9]Nanwani, Suresh, & Ayus, A. Mohaimin. (2007). Strengthening legal education and judicial training in the Maldives: case study. IIUM Law Journal, 15(2), 171-196.

The legal education at the regional level university must embark upon the professional project to motivate young lawyers in making the region adhere to the principles of Rule of Law. This project will not only ensure stability in the region but will go long way in creating close bond between the member states striving for a just and equal world. The courses will have to be designed to provide students the pathways and the ideas by which they will as lawyers, as prosecutors, as judges and as legal draftspersons promote justice in the contemporary political, social and economic context. Regional level legal education can revive the law and justice debates in the context of ongoing economic constraints embedded in the structure of the profession. For doing so, the SAU can embark upon the professional project, whose principal objectives could be:

Taking Advantage of Shared Colonial Legacy

SAARC member states (except Afghanistan[10]) were all part of the British colonial project, and therefore, the majority of SAARC member states share the same colonial legacy, in terms of laws and regulations. Post independence, previous colonies as independent nations have made several attempts to re-imagine, previously unrecognized histories. Not only colonies, but even researchers from colonizers side have shown great interest in exploring the ancient past of their colonies. One such example is given by Lingat, who has observed in this works that in building up their laws, ancient civilization did not take coercive element as their starting-point which has served the West as a foundation for characterizing and distinguishing a legal rule from other rules to control the human activity. Ancient civilization, instead took duty as their starting point and from it derived a more general notion which exceeds the domain of law in many respects without actually comprehending it entirely. They did not make any attempt specially to define rules to constrain people by an external or physical sanction. But they taught people the rules of conduct ought to be observed by reason of their condition in society—and amongst these rules, the rules of law are to be found.[11] Even during their colonisations, courts had started pointing out to their appointing masters that many of legal principles and doctrines that were thought as imported from the west, in fact very much existed and operated the judicial and legal processes. For example, Justice Tek Chand delivering the unanimous Full Bench decision in the case of *Mussammat Lachhmi v. Mussammat Bhulli* (ILR Lahore Vol. VIII, 384) traced the history of doctrine of res judicata in both Hindu and Mohammedan jurisprudence.[12] Therefore, today when legal education is called upon to acknowledge and address past injustices, SAARC member states, with their distinctly layered and contested pasts yet shared colonial legacy, struggle with many such calls for undoing past wrongs. Future lawyers of the subcontinent have to meet similar calls and regional level legal education discourse whether it

[10]Legal education in Afghanistan prior to the Soviet occupation, by Robert F. Williams, 6 Suffolk Transnat'l L.J. 247-276 (1982)

[11]Robert Lingat, *The Classical Law Of India*, (translated from the French with additions by J. Duncan M. Derrett, OUP, Delhi (1998)

[12]As quoted by the SC of India in M. Nagabhushana vs. State of Karnataka and Ors. AIR2011SC1113

be taken under the aegis of SAU or some other private or public university has to develop abilities of students for reflection on the delicate aspect of addressing certain historical wrongs in modern liberal democracies.

Learning from Similar Experiences owing to similar Tensions

It is an important and inescapable social fact that in South Asian societies, modern "state law" exists in continuous tension with the customary law of "communities" (be they tribes or castes) and religious laws such as *fiqh* which represent human interpretation of the Shariah and the *Dharamashashastras* which represent understanding of the Sanata Dharma.[13] In that regard, SAARC region contrast sharply with Western Europe where, over the course of two millenia, as a result of multiple factors – "Roman Empire", Christianization, "Protestant Revolution" and Enlightenment – state law has attained an exclusive hold over the people's imagination. Not so in South Asia, where both religion and primordial associations continue to enjoys vastly greater hold in both legal and normative questions. This is exactly why South Asia legal scholars should be motivated and encouraged to exchange notes with each other about how to deal with the tension between law, religion and tribal/caste custom. However, at present, as the newspaper reports reflect[14], SAU as a university that was designed to encourage south Asian scholars to develop ideas freely without any fear, has become another institution that is stifling scholars and discouraging them from free thinking. It is only when university allows complete freedom to its scholars that the scholars can take few steps in the direction of learning from common ancient past giving them experience for dealing in future with the common tension between law, religion and custom in their domestic situation.

Setting Up Professionalism as an Agenda for Legal Education

In recent past, almost all member states have experienced instances of professional codes falling too short to address the built-in systemic subversion- carefully crafted by vested interest- that put the administration of justice in real peril.[15] The member states of SAARC thus continue to face falling standards of legal profession in their respective jurisdictions.[16] And there is realization that compiling booklets of rules and regulation and developing codes on ethics - are

[13]Heitzman James, Worden L. Robert (1995). INDIA: A COUNTRY STUDY, Federal Research Division, Library of Congress, Washington, p. 850.
[14]Ghosh, Jayati, *From protests and suspensions to Noam Chomsky: The decline of South Asian University,* Indian Express dated 19.08.2024
[15]Baxi, Upendra. (1982). THE CRISIS OF THE INDIAN LEGAL SYSTEM, Vikas Publishing House, Delhi: 75
[16]See generally directions of the Supreme Court of Pakistan issued in Constitution Petition No. 133 of 2012. See also, Shah, Sardar Ali, Balasingam, Usharani, & Dhanapal, Saroja. (2018). Legal education in Pakistan: an overview. IIUM Law Journal, 26(2), 401-432.

not of any help in redressing this situation.[17] The regional level legal education discourse seems to provide the possibility for an isolation from the compulsions of domestic setting. Such isolation offer ample opportunities to the educators to develop and inculcate values in students that makes them shun any kind of unwanted unprofessionalism and unethical behavior. The SAU to deliver such value-based discourse can tie up with the National Law School at Bangalore to get help in developing pro-bono clinics. Through preparation for pro bono professionalism, students from the region could be motivated to work for larger public interest. The clinical experiences whether gained in India or any other member state, will create a separate cadre of legal professionals desirous to use the law as an instrument to serve the vulnerable population and for getting justice from the courts. The culture of preparing students for taking desk jobs will have to be abandoned for time being to build a vibrant legal community willing to contribute to development of law in their jurisdictions.

Increasing Gender Representation in Legal Education

Number of western scholars have criticized their model of legal education, terming it as a male creation.[18] The situation elsewhere has been same. But in the context of South Asian region it only gets further aggravated as the domestic cultural norms are not conducive in many member states of SAARC for equal participation of female students in educational activities. The SAU, it was established, to free education from any domestic compulsions. It was expected that female students from the region after being far away from these domestic compulsions, could achieve successful legal career after getting quality legal education. It is expected therefore from the SAU to provide greater preference to enroll female candidates from the region so that the gender disbalance in domestic settings is set right.

Promoting Judicial Education & Civil Service Trainings

Amir observes that SAARC countries have advantage of having formal judicial education bodies since last couple of decades and therefore it would not be wrong to presume that they understand the real issues the judiciaries are confronting these days and develop accordingly the training needs for their jurisdictions. Amir rightly notes that the SAARC works for the people of region on different issues except in the area of judicial cooperation.[19] It therefore, falls upon the shoulder of the SAU with its up-to-date infrastructure, location and

[17]Munir, Muhammad Amir, Re-Orientation of Legal Education: An Agenda for 21st Century (1997). Punjab University Law Journal, Vol. LIV, (1997): 67-102, Available at SSRN: https://ssrn.com/abstract=2233345

[18]Weiss Catherine, Louise Melling, (1988) The Legal Education of Twenty Women, in Stan. L. Rev. 40: 1299-1300

[19]Munir, Muhammad Amir, South Asian Chapter of CJEI - A Blueprint for Establishing a Regional Judicial Education Body (April 13, 2012). Proceedings of the International Judicial Conference, 2012, Law and Justice Commission of Pakistan/National Judicial Policy Making Committee, Supreme Court of Pakistan, Islamabad, Available at SSRN: https://ssrn.com/abstract=2052394

facilities to step in to fulfill the role that some important EU institutions perform.[20] What role the regional affiliation such as European International University in France, European Institute of Public Administration in Luxemburg, and European Judicial Training Network in Belgium are playing for developing and implementing common agenda for the EU region through educational activities, can be taken up by the SAU due to the huge investment that has gone in constructing it as a regional centre of excellence. It is time to show this excellence beyond paper by actual delivery of educational and trainings activities – for they not only increase capacity and capability of citizens of member states, but even go beyond to serve the larger interest of ensuring the Rule of Law in the region.

Preparing Lawyers Skilled in Court Craft

In almost all jurisdictions (of member states of SAARC) a gap is felt between what is delivered as legal education in the classrooms and what is required as a barrister, solicitor, attorney or prosecutor.[21] One reason that emerges for this gap is that the law schools are not given space and time to deal with subjects in depth and in comprehensive way by connecting it to other subjects. For example, child sexual abuse trials cannot be taught with the help of special law providing offences and punishments alone. It needs to be taught along with procedural laws and how the silly procedural mistakes by the investigation branch in meeting the procedural requirements leads to poor prosecution. Without such in-depth orientation, a student cannot be prepared as a lawyer to argue in defence of the accused or as a prosecutor for the state in CSA trials. As the SAU is not under the local pressure of completing the fixed syllabus, it will be in better position to design its discourse to take care of these intricacies and offer specialized in-depth orientations needed for preparing students for the court craft and for handling trial complexities before the courts.

Building Personality with Curricular Activities

A study was conducted to get deep knowledge about co-curricular activities and its impact on the personality development. Descriptive correlational research was conducted; a multi-stage random sampling technique; a quantitative survey encompassing 300 female and 300 male students was selected. It incorporated two closed-ended questionnaires. Mann Whitney U test was utilized to analyze the difference between students' participation in co-curricular activities and personality development on the basis of gender. Eta test was used to explore the possible correlation between co-curricular activities and personality development. It revealed a positive significant relation between co-curricular activities and personality development of students. Results provided implications for educational administrators,

[20]European Judicial Training Network (for Europe); Commonwealth Judicial Education Institution (for Africa)

[21]See Aredshir Cowasjee, "Looking the Future", published by *Daily Dawn* (Pakistan), dated 27.06.2010

teachers, students, parents, and government for implementing co-curricular activities.[22] Other researchers have also established that co-curricular activities have permitted the students to build many competencies such as social interface skill, community speaking skills, performance skills, and coordinating skills. These activities also accelerate brainpower development, knowledge attainment, mental fitness, physical fitness, and personality development of students which leads to the overall dynamic development of students.[23] Singh has further established that the co-curricular activities play a crucial role in the educational institutions, contributing to the cultivation of students' personality development, moral values, ethical understanding, and integrity, thereby strengthen the instruction well-educated in the classroom settings.[24] New Education Policy (2020) of India encourages educational institutions to focus on overall personality development through co-curricular activities. The SAU must design undergraduate courses so as to encourage involvement in different co-curricular activities. Students have to be given credits for taking part in outdoor games like cricket, basketball, tennis, and football to foster broader enthusiasm and engagement in different games and sports activities.

Mobilizing Young Graduates for Delivery of Justice

The regional level law graduation degree at the SAU has to help law graduates inculcate skills to use law to produce social change. There is much to be learnt from the iconic case of South Africa where the political and legal struggle to overturn apartheid has translated into real equality. The common standard curriculum must focus specifically on the constitutional imperatives from the member states of SAARC promoting equality, liberty and justice so as to motivate future lawyers to employ their knowledge and skills to reduce poverty and inequality in their jurisdictions.

Preparing Lawyers for Nation Building

Munger maps the careers and work of lawyers who confronted the state in Thailand and what they achieved vis-à-vis women's rights, environmental protection, antipoverty movements, and increased the "government accountability, respect for rights, consistent with liberal interpretation of the 'rule of law.' White[25] offers analysis of innovative lawyering for economic and social rights in Ghana. She informs about collaboration between community residents and law students to

[22]Shahzadi Aroosh Khan; Rabia Tabassum; Noor Muhammad. (September 2023). A Survey of Secondary School Students in Lahore, Pakistan on the Relationship between Co-Curricular Activities and Personality Development. Pakistan Journal of Law, Analysis and Wisdom, 2(2): 984-1002

[23]Siddiky, M.R. (2019). Developing co-curricular activities and extra-curricular activities for all-round development of the undergraduate students: A study of a selected public university in Bangladesh. Pakistan Journal of Applied Social Sciences, 10(1): 61-82.

[24]Singh, A. (2017). Effects of co-curricular activities on academic achievements of students. International Journal of Education and Multidisciplinary Studies, 6(3): 241-254.

[25]White, Lucie E. (2011). African Youth Mobilize against Garbage: Economic and Social Rights Advocacy and the Practice of Democracy. THE PARADOX OF PROFESSIONALISM: LAWYERS AND THE POSSIBILITY OF JUSTICE (Scott L. Cummings ed., Cambridge Univ. Press) 274.

reform health and sanitation systems in a very-low-income community called Nima. These two examples from Cumming's note[26] support the law schools in involving their students in policy making initiatives. The regional legal education discourse must now shy away from creating space for greater partnership between student community and policy makers in delivery of schemes to beneficiaries on the ground level. Such experience will go long way in creating maturity in students and in making them understand the role of law in community.

Stimulating the Interest in IHL

Academic community has contributed immensely to popularize teaching and research in area of International Humanitarian Law (IHL) ever since adoption of the Geneva Conventions in 1949 and their two Additional Protocols in 1977. Universities in the West have been teaching IHL, not as an optional or an elective paper, but as regular course paper. IHL has found a place in law schools across universities in the UK and Europe. In fact, number of training and research centres have been established in the universities dedicated specifically to conduct academic courses and research on IHL. The most notable ones being Graduate Institute of International and Development Studies, Geneva[27]; Geneva Academy of Human Rights and Humanitarian Law[28]; International Institute of Humanitarian Law, San Remo, Italy[29]; The International Humanitarian Law Project, London School of Economics (LSE).[30] In the US also, about 40 law schools are offering a dedicated course on IHL either as a stand-alone module or packaged with courses on national security, human rights, ICL or related fields.[31]

[26]See Scott L. Cummings, "The Politics of Pro Bono", 52(1) UCLA L. Rev. 2004: 37

[27]This Geneva-based institute in Switzerland offers IHL as a separate course in their curriculum designed for postgraduate taught and research programmes in law. The Graduate Institute has made a name for itself through its extensive study and research on Public International Law, especially IHL and International Criminal Justice.

[28]This is an academy affiliated to the University of Geneva, Switzerland that is dedicated completely to the teaching and research of Human Rights Law and IHL. It offers a postgraduate taught degree (LLM) in IHL and initiates various research projects on IHL from time to time under the auspices of Geneva University. It receives generous funding from the Swiss government to carry on research work all throughout the year.

[29]This non-governmental organization (NGO) was set up in 1970 for the purpose of promoting the dissemination and development of IHL. Over the years, 63 courses have been held, despite many difficulties. There have been more than 2,000 participants including officers, government officials and academics from 140 countries. The fact that countries from the five continents send participants, from captains to major generals, to the San Remo Institute's courses on the LOAC shows at the very least that these courses are deemed highly necessary. Many countries have requested scholarships and the institute is able to grant some to certain countries.

[30]This research project undertaken at the Department of Law, LSE has taken up the mantle of coordinating and encouraging research and teaching of IHL within the borders of the UK. Faculty members of the Department of Law at LSE are associated actively with the centre, thereby engaging in seminars, conferences, discussions and research projects on the LOAC. Visiting professors such as Prof. William Schabas are involved in the project that aims to engage the legal academia in the formulation of solutions to complex contemporary issues.

[31]Teaching International Humanitarian Law at U.S. Law Schools, available at https://international-re view.icrc.org/sites/default/files/irrc-895_896-blank-kaye.pdf [Last visited on 20 September 2024]

In Asia, member states within SAARC have not taken any dedicated step to popularize teaching of IHL. Some member states are offering IHL as an optional subject, even though many of them have been ravaged by war and conflicts over the past two decades. As those states emerge from conflict and try to rebuild themselves through the administration of post-conflict justice and the rule of law, the regional level educational efforts to popularise IHL as core paper can play an important role in extending the benefits of relief, reconstruction and reparation in post-conflict societies. As noted by Ghosh, the changing nature of IHL in the context of the global war on terror, role of non-state actors in IHL, role of ICC, emergence of transnational armed groups in the post-9/11 era are still not a part of the IHL curriculum in most of law schools of member states. Without the inclusion of such developments in the curriculum, classroom teaching of IHL remains incomplete.[32] In this context, the SAU can step in to provide contemporary developments besides raising theoretical underpinning of the subject. As noted in the EU context, legal education discourse has played very important role in consolidation of EU conventions, treaties and the EU law itself has been carved out as an important discipline for which member states within EU are offering specializations. The regional level legal education discourse can help legal profession in Asia to build strong ties and this will go long way in building strong bonds between the member states.

Educating Lawyers in Contemporary Social Context

Almost all the member states of SAARC are having substantial young population at risk of being deprived of their basic rights. Therefore, the regional level legal education discourse has to offer the specialized courses to create awareness on the pressing socio-economic problems and make legal profession future ready to offer possible solutions through laws and regulations. Educational interface will create greater understanding of available framework[33] and help in better implementation of rules and regulations to address complex problems faced locally.

Increasing Cross-border Flows of Students within SAARC

Some decades ago, one western scholar had travelled to both India and Pakistan for his empirical study on legal education in India and Pakistan.[34] His observations six decades ago that - students in both countries pursue legal education with hardly any interest in learning the law and the percentage of those

[32]Ghosh, Pritam. (2015). Teaching and Research of International Humanitarian Law in Asia: Efforts, Issues and Prospects. ASIAN J. LEGAL EDUC. 2(1): 1-16

[33]Every member state of SAARC has laws and regulations to benefit their child population. Nonetheless situation on ground is contrary in all member states. It is therefore high time that all member states come together to share their success-failure stories, thereby enriching each in ideas to deal with ground level situations.

[34]Rice, W. G. (1958). Quick look at legal education in Pakistan and India. Journal of Legal Education, 11(3), 364-366.

who are serious scholars go abroad for their legal education - still hold true for SAARC member states as confirmed by the recent study of countries from where students go outside to study.[35] The UNESCO study confirms that students from SAARC member states have been migrating to the west for their education as reflected by the table below:

Country	**Outgoing students**	**Incoming students**	**Destination where internal students go**	**5 countries from where maximum students come**
Australia	12026	294438	US, New Zealand, UK, Germany, Canada	China, India, Malaysia, Vietnam, Nepal
China	801187	123127	US, Australia, UK, Japan, Canada	No data
France	80635	235123	Belgium, UK, Canada, Switzerland, Germany	China, Morocco, Algeria, Tunisia, Senegal
Germany	116342	228756	Austria, Netherlands, UK, Switzerland, US	China, Russia, India, Austria, France
India	255030	41993	US, Australia, UK, New Zealand, Canada	Nepal, Afghanistan, Bhutan, Nigeria, Malaysia
Italy	56712	90419	UK, Austria, France, Germany, Switzerland	China, Albania, Romania, Iran, Greece
Japan	30179	132685	US, UK, Germany, Australia, France	China, South Korea, Vietnam, Nepal, Indonesia
Kazakhstan	77,965	12,533	Russia, Kyrgyzstan, US, Turkey, UK	Uzbekistan, India, China, Kyrgyzstan, Russia
Korea republic	108047	54540	US, Japan, Australia, UK, Canada	China, Vietnam, Mongolia, US, Japan
Malaysia	64480	60244	UK, Australia, US, Egypt, Jordan	Bangladesh, Indonesia, China, Nigeria, Iran
Nigeria	75539	No data	UK, Ghana, US, Malaysia, Ukraine	No data
Russia	56328	226431	Germany, Czechia, US, UK, France	Kazakhstan, Ukraine, Belarus, Turkeminstan, Uzbekistan
Saudi Arabia	86486	73077	US, UK, Canada, Australia, Jordan	Yemen, Syria, Egypt, Palestine, Pakistan
UK	31078	428724	US, France, Netherlands, Germany, Australia	China, India, Nigeria, Malaysia, US
US	67665	907251	UK, Canada, Grenada, Germany, France	China, India, South Korea, Saudi Arabia, Canada

[35]done by UNESCO in year 2017. See, Anthea Roberts, Cross-Border Student Flows and the Construction of International Law as a Transnational Legal Field In: The Globalization of Legal Education. Edited by: Bryant Garth & Gregory Shaffer, Oxford University Press. © Oxford University Press 2022. DOI: 10.10 93/oso/9780197632314.003.0014. See also, Anthea Roberts, Cross-Border Student Flows and the Construction of International Law as a Transnational Legal Field, 3 U.C. IRVINE J. INT'l TRANSNAT'l & COMP. L. 1 (2018).

The above table was referred by Roberts to clarify that student flows are often concentrated within legal families and, in particular, along ex-colonial pathways. However, as professor of private university in India at present, I am finding that student flow from Africa and neighboring countries is on rise to India. I am teaching at all levels, and student from outside India at Sharda University where I am presently teaching are in good strength. This new destination of India for Legal Education has to be carefully looked into. Though private universities like Sharda University are open to new approaches and networks (incoming influences), the government managed institutions like SAU are not ready to play a meaningful role to turn themselves into institutions of learning that are able to diffuse ideas, materials, and approaches across borders (outgoing spheres of influence). The recent controversy around Perera, a Lankan cultural anthropologist who taught Sociology at SAU for 13 years, and was a founding member of its Sociology department - proves that the government universities in India are not ready to provide the academic environment that can attract foreign students and foreign faculties. Perera was forced to take voluntary retirement amid a disciplinary inquiry against him over the research proposal.[36] It was expected from the SAU that it will offer opportunities to students from not only SAARC member states, but even from neighbouring non-members by offering cost effective quality education meeting global educational needs. However, recent news on SAU proves that it is still not ready to shred the nationalized approach to law, and offer the academic environment that exposes domestic, regional and international students to universal approach to the law.

Conclusion

SAARC nations collectively fund the SAU, and therefore, the law graduation programme at SAU designed after consensus among all member states as equal partners – can wipe out inherent deficiencies that academic community feels due to mis-match between course objective and student maturity.[37] Further, a common standard curriculum for all the member states to raise the bar of legal education, comprising of common legal principles for which every member state would like to orient their law graduates, will prepare students the skills and capacity to serve any jurisdiction of their choice. This common standard curriculum prepared with 80 percentage of standard legal principles that are universally applicable, and 20 percentage of discourse to be delivered through local experts appointed from all the member states at the SAU – will provide comprehensive legal education to

[36]Vidheesha Kuntamalla, Deafening silence and choreographed timidity in SAU, says Sri Lankan scholar forced to quit over Chomsky's criticism of NDA govt, The Indian Express, Friday, September 20, 2024. Available at https://indianexpress.com/article/india/sau-sri-lankan-scholar-sasanka-perera-forced-to-quit-9550920/ [Last visited on 20 Sep. 24]

[37]Clinical Legal Education in Asia. Edited by Shuvro Prosun Sarker, Palgrave Macmillan, New York, 2015, 250 Pp., ISBN 978-1-137-51753-1. See also, Legal Education in Asia. Edited by Shuvro Prosun Sarker, Eleven International Publishing, The Hague, 2014. Pp. 298.

make students not only industry ready to serve the justice system of any member state in the SAARC, but also employable in any other foreign jurisdiction.

At present, the website of SAU[38] (as of today on legal studies department known as faculty of legal studies) does not inspire any such confidence in its capacity to undertake such supra-national project. The website informs the public that only Indian faculties (that too 1 professor who is acting dean and who was investigated for sexual harassment complaint[39]), with the help of another four – five associate professors - is managing the legal education department. All of them are drawn only from one country (India) and other member states do not have their representation in the law faculty. This does not augur well for the image of the SAU, and makes the promises made by the SAARC to work in collaborative culture, sound hollow.

For undertaking any supra-national project, the SAU, first of all has to appoint in its every department, the faculty or experts drawn from all eight member states. The faculty of legal studies too needs to adhere to this norm of having diverse faculty from all 8 member states to teach local laws to the local and foreign students. In fact, student intake or the faculty intake of every member state has to be fixed and the department administration has to be offered in rotation to every member state to as to make it truly regional level centre of excellence with credible credentials. All students at the SAU must be offered an option to learn the local laws of their own country or of any other member states. Such comprehensive comparative discourse will produce well rounded and informed legal community, ready to serve subalterns in any of the member states. When these students return their home to practice or teach the law, they are ready with ideas, approaches, and materials from wider perspective to deal with their specific ground situation.[40] It is therefore high time that the SAU structurally brings changes to make itself a true regional centre for educational excellence so that the foreign students who take admission in its programmes are prepared to survive in a globally competitive world.

The SAARC needs to organize meetings of the legal education regulators of all the member states to bring a consensus on common core curriculum to be delivered to their students. Ultimately, the legal education regulators from the member states will have to take a final call on future of their legal professionals. Whether they want to focus on the current technological revolution, or present climate changes, or socio-economic developments in the region, or inculcate the corporate culture, are the matters that require broad consensus among legal education regulators. Based on the common minimum agreed curriculum, the SAU needs to undertake development of undergraduate courses by dividing its time between the common subjects and the local laws.

[38]https://sau.int

[39]https://www.shiksha.com/news/college-sau-law-student-writes-to-ministry-of-external-affairs-demanding-action-against-prof-blogId-122915

[40]See Peter Mattis, Reexamining the Confucian Institutes, DIPLOMAT, Aug. 2, 2012.

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Shifting Paradigms: The Controversy and Complexity of LGBTI Protection in Indonesia as the Biggest Muslim Country

*By Ida Susanti**

The existence of Lesbian, Gay, Bisexual, Transgender, and Intersexual (LGBTI) as a legal subject in a religious community like Indonesia is very problematic. When religious values control a community, the members will use their holy books to measure whether any commotion or condition is tolerable. Collisions between the law of religion (such as Sharia Law of Muslims) and national law are sometimes unavoidable. Most conservative religious values may not protect and acknowledge the existence of LGBTI people, while national law must recognise the ratified international conventions, especially regarding human rights. It creates a different treatment between national law and religious law. Protection of the rights of LGBTI in Indonesia is barely reported. This study will be important to share how Indonesia copes with LGBTI legal problems and protections. The method of this study is a juridical normative study, by evaluating Indonesian positive law, the living law ruled by the Indonesian Court Decrees, and any decree or decision made by Indonesian executive and judicative bodies, which become the basis for determining the existence of rights and protections of LGBTI people. Classification of the protection from various sectors of laws will be identified, to conclude the protection level of LGBTI people in Indonesian law.

Keywords: *LGBTI; Indonesia; Positive law; Religious values*.

Introduction

In 2015, the existence of lesbian, gay, bisexual, transgender, and intersexual (LGBTI)[1] had been re-exposed and it had been controversial. The trigger of this issue was the joint initiative from twelve United Nations agencies that mentioned: "*Our organizations stand ready to support and assist Member States and other stakeholders as they work to address the challenges outlined in this statement including through constitutional, legislative and policy changes, strengthening of national institutions, and education, training and other initiatives to respect, protect, promote and fulfill the human rights of all LGBTI people*[2]*"*.[3] This

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[1]This paper uses terminology LGBTI. This terminology is more commonly used in Indonesia because other types under the scope of queer beside LGBTI is not often be discussed. See Rouse (2022).

[2]This paper will not theoretically elaborate the concept of LGBTI. It just describes LGBTI people as 'diverse sexual orientations and gender identities'. See: Drafting Committee.

initiative activated opposition to LGBTI[4] because many people in Indonesian society have sexuality-related phobias such as homophobia or transgenderphobia[5]. They thought that those 12 UN agencies had promoted diverse sexual orientations and gender identities in Indonesia and therefore many people in Indonesia openly refused their existence.

There was protection for LGBTI at the international level, especially with the support from the United Nations for all activities aimed at protecting, promoting, and fulfilling the human rights of LGBTI people. On the other hand, there had been various criticisms from within the country, which concerned about the emergence of disruption to stability in society, caused by the movement to support these LGBTI people. Another thing that triggered the re-emergence of this old phenomenon was the presence of several organizations on campus such as the Support Group and Resource Center on Sexuality Studies at the University of Indonesia. This Center provided counseling to LGBTI people, which led to the notion that the campus accepted the presence of LGBTI. No less than the Minister of Research, Technology and Higher Education at that time, M. Nasir gave a statement rejecting the presence of LGBT people on campus[6]. The Minister of Research and Technology then corrected his statement by saying that their presence on campus was not refused, but their activities[7]. Several members of the *Dewan Perwakilan Rakyat* (DPR - House of Representatives) gave statements condemning the existence of LGBTI in society, for example, Mohhamad Nasir Djamil, Member of Commission III of the DPR from the *Partai Keadilan Sejahtera* (PKS - Prosperous Justice Party) at that time stated that "the campus should be more concerned and sensitive in protecting its students from attempts to infiltrate LGBT understandings"[8]. According to him, we must firm to prevent this idea from damaging the nation. From this opinion, it can be concluded that Mohhamad Nasir Djamil considers LGBTI an "understanding" and does not include the existence of abnormalities or physical deviations that cause a person to become LGBTI.

Opposition statements against LGBTI from various political elites were addressed not only toward LGBTI people but also LGBTI-supporting organizations or initiatives. Fundamental legal issues emerge: Can LGBTI be

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[3]12 UN Agencies, Ending Violence and Discrimination Against Lesbian, Gay, Bisexual, Transgender and Intersex People. This document is available online at the Office of the High Commissioner for Human Rights website.

[4]The letter I refers to intersexuality, which until now in Indonesia has not been explicitly categorized as a separate group. Intersexual is defined as "a human being who is born with sexual characteristics (including genitals, reproductive organs and, chromosomal patterns) that are not following the characteristics of a man or a woman". Free and Equal (United Nations for LGBT Equality), 2015, p. 1.

[5]The LGBTI terminology will be used in this paper, except if this paper refers to other resources, which use different terminologies, such as LGBT, the original terminologies in the references will be used. So far, more Indonesians are concerned about and disturbed by transsexuals, even though there are a lot of transsexuals in Indonesia who occur because of intersexual issues. In Indonesia, transsexual is the most expressive and coming out.

[6]Batubara (2016).

[7]Harian Rakyat Merdeka, (2016*).*

[8]Irawan (2016).

considered "full legal subjects", having the same rights as heterosexual-oriented groups in society? Or are they (in specific rights) only considered as "pseudo-legal subjects", who do not have the same rights as heterosexuals? Is there any shifting paradigm in Indonesia as the biggest Muslim country in the world in protecting LGBTI people?

Research Method

This paper will employ a normative juridical method to observe the existence and recognition of LGBTI in Indonesian law. This normative juridical study will provide an objective study to interpret or construct positive laws and court decrees, which will lead us to conclusions about the level of protection of Indonesian law for the rights of LGBTI people in Indonesia. This paper will not examine all positive laws related to LGBTI rights, but it will select several rules related to the most basic rights, which will be selected using the guidelines for human rights in the 1945 Constitution. The report will observe the pattern of protection from different eras, to show the shift of paradigms regarding LGBTI in Indonesia.

Normative Review and Analyses

The Fundamental Principle of the State and Its Impact on LGBTI Rights

As a first step in studying LGBTI rights, we should use Pancasila as a guideline, bearing in mind that Pancasila is the basic norm and fundamental principle of the state. The values of Pancasila cannot be violated. The fundamental values of Pancasila include 5 precepts (it is called *sila*), which consist of:

- First *sila*: *Ketuhanan yang maha esa* [Belief in the one and only God];
- Second *sila*: *Kemanusiaan yang adil dan beradab* [Just and civilized humanity];
- Third *sila*: *Persatuan Indonesia* [The unity of Indonesia];
- Fourth *sila*: *Kerakyatan yang dipimpin oleh hikmat kebijaksanaan dalam permusyawarahan/perwakilan* [Democracy guided by the wisdom in the unanimity arising out of deliberations among representatives];
- Fifth *sila*: *Keadilan sosial bagi seluruh rakyat Indonesia* [Social justice for all Indonesian people].

In practice, these values are implemented through Laws and other operational legislations. The first *sila*, "Belief in the one and only God", is the most relevant *sila* for LGBTI protection. The implementation of this *sila* is not neutral, because it is interpreted based on the values of religions. For example, it affects the right of LGBTI to marry (this will be discussed further in a separate section). These precepts have been reduced to the right to have a religion, which is regulated both in the 1945 Constitution and other laws. Until now, in Indonesia, the right to

religion is implemented closer to the concept of the obligation to have religion. This is very visible in the population administration system in Indonesia, which requires every citizen to indicate their religion on their identity card. In a context like this, it shows that this first *sila* will greatly influence the implementation of the religious life of Indonesian people. As an example, religion becomes a measuring tool to determine the legality/illegality of a legal action or relationship. Other rights that are more neutral, such as civil rights (other than rights in family law), political rights, and economic rights can be linked to the second, fourth, and fifth *silas*. The right of LGBTI to get fair treatment based on humanity is a civil right inherent in them. The right of LGBTI to be elected or vote in elections, for example, is an application of the fourth *sila* of Pancasila. The right of LGBTI to benefit from the national social security system is an application of the fifth *sila*. To find out the rights of LGBTI in more detail, we will discuss how Indonesian Law protects their rights.

LGBTI in the 1945 Indonesian Constitution

Indonesia's population is 277,534,122 people, occupying the fourth position in the world's most populous country[9]. Out of this very large population, even though Indonesia is not a religion-based country, Indonesia acknowledges 6 religions as Indonesia's official religion[10]. It means Indonesians cannot choose other religions than those official religions. Of the six religions, Islam is the biggest religion in Indonesia. Therefore, most Indonesians are Muslim, and Indonesia is the largest Muslim nation in the world. Consequently, the existence of LGBTI is analysed based on Islamic values by most people.

The problem is that according to the 1945 Constitution Article 1 paragraph (3) "Indonesia is a state law", which must be based on a rule of law. The rule of law must meet several conditions[11]. According to A.V Dicey, the three important characteristics of a state based on the rule of law are the supremacy of law, equality before the law, and human rights[12]. How should we give context to these three characteristics in Indonesia context?

First, the supremacy of law means that law is above other things. All matters within the country must be regulated by law. Therefore, legislation and jurisprudence are important sources for solving legal problems. The imposition of sentences or the execution of acts that burden certain parties, for which there is no

[9]United Nations, 2022.

[10]Article 1 of Law No. 1/PNPS/1965 & Law No. 5 of 1969 regarding the Prevention of Abuse of Religion and/or Blasphemy [*Undang-Undang Nomor 1/PNPS/1965 jo. Undang-Undang Nomor 5 Tahun 1969 Tentang Pencegahan Penyalahgunaan dan/atau Penodaan Agama*] indicates that "*Setiap orang dilarang dengan sengaja di muka umum menceritakan, menganjurkan atau mengusahakan dukungan umum, untuk melakukan penafsiran tentang sesuatu agama yang dianut di Indonesia.*" ["Everyone is prohibited from intentionally telling in public about, advocating or seeking public support, to interpret a religion practiced in Indonesia." What is meant by "religions practiced in Indonesia" can be found in the explanation of this article, including Islam, Christianity, Catholicism, Hinduism, Buddhism and Confucianism.

[11] Principe (2000) at 359.

[12] Craight (2007).

legal basis, can be considered arbitrariness. What is meant by "law" here? This law will refer to the rules of law. Furthermore, rules of law can be interpreted as "a system that attempts to protect the rights of citizens from arbitrary and abusive use of government power"[13]. These rules of law are used to protect citizens from actions taken by the government arbitrarily and unlawfully. One of the important characteristics of the rules of law is that "the law should be written with reasonable clarity to avoid unfair enforcement". The rules of law require a promulgation process so that the legal instruments must be formulated precisely in written legislation or court decrees, to create legal certainty for its enforcement. What is referred to as the rules of law in the Indonesian legal system are legislations promulgated by authorised officials, in the form of legal sources stated in the hierarchy of Indonesian laws, as stipulated in Law No. 12 of 2011 concerning Formation of Legislation. Therefore, the main reference is the state law, not sharia or customary laws, which are not parts of the hierarchy.

Second, equality before the law means that everyone has the same position before the law. Everyone has the right to obtain legal protection and obtain their normative rights. This principle is emphasised in Article 27 paragraph (1) of the Republic of Indonesia Constitution, namely "all citizens have the same position before law and government and are obliged to uphold law and government with no exceptions". Article 27 paragraph (1) not only regulates the equal status of all citizens before the law and government but also regulates the supremacy of the law, because every citizen is obliged to uphold the law and government. Furthermore, the 1945 Constitution also elaborates on the issue of equality before the law in Article 28D paragraph (1), which reads "Everyone has the right to recognition, guarantees, protection and fair legal certainty and equal treatment before the law". and Article 28I paragraph (2) which states "Everyone has the right to be free from discriminatory treatment on any basis and is entitled to protection against such discriminatory treatment". These regulations are in line with the non-discrimination principle, which has been recognised as a universal principle in the protection of human rights.

Third, human rights are an important aspect that is expressly guaranteed by laws in Indonesia. Human rights are regulated in Chapter XA Articles 28A-28J and some articles outside the Chapter on Human Rights in the Indonesian Constitution. If we classify human rights protection in the 1945 Constitution, we can divide them into four major groups:

- Civil and political rights, which are regulated in Article 27 (1), Article 28, Article 28 D paragraph (3), 28 E paragraph (3) and (4);
- Security rights, which is regulated in Article 27 paragraph (3), Article 28 G, 28 I paragraph (1), 28 J and Article 30);
- Social and cultural rights, which are regulated in Articles 28 A, 28 B, 28 C, 28 E paragraph (1), 28 F, 28 H paragraph (1) – (3), 28 I paragraph (2) – (5), 28 J, 29, 31 and 32);

[13]Yu & Guernsey (2016).

- Economic rights, which are regulated in Article 27 paragraph (2), Article 28 D paragraphs (1) and (2), 28 H paragraphs (4), 33 and 34.

The author does not intend to theoretically debate the above categorization of human rights. The purpose of this division is to guide the writer to examine the most important rights of LGBTI.

The human rights provisions in the Indonesian constitution must be regulated further in operational regulations. In 1999, the government passed Law No. 39 of 1999 concerning Human Rights (Law on Human Rights). In addition, Indonesia adopted/ratified international legal instruments on human rights, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Child. This shows that Indonesia recognises and upholds human rights.

As a state law, Indonesia must recognise the rule of law. criteria put forward by A.V. Dicey above, Indonesia has met all the criteria. Consequently, Indonesia must also act as a rule of law state and must implement the three pillars of a rule of law state above in all aspects of people's lives, including in regulating LGBTI issues, bearing in mind that Article 27 paragraph (1) of the 1945 Constitution unequivocally states that "all citizens have the same status in the law […]". This shows that LGBT, as long as they are citizens, must have the same position before the law. Therefore, this paper will examine further, whether is it true that Indonesian law has upheld the rights of LGBTI, as it is mandated in the 1945 Constitution.

Civil and Political Rights of LGBTI

Civil and political rights in Indonesia, apart from being regulated in the 1945 Constitution as described above, can also be found in various separate regulations, for example:

- Every citizen has the right to become a member of a political party because the formation and membership of a political party is by a group of Indonesian citizens[14].
- Every worker/laborer can form a trade union or labor union, both within the company and outside the company[15].
- Everyone is free to vote and be elected according to his political beliefs[16].
- Every citizen is obliged to participate in defending the country[17].

[14]Article 1 point 1 Law No. 2 of 2011 on Ammendment of Law No. 2 of 2008 on Political Party.
[15]Article 1 point 17 Law No. 13 of 2003 on Manpower, which is reaffirmed by article 5 paragraph (1) Law No. 21 of 2000 on Labour Union. This issue is also regulated by Law No. 39 of 1999 concerning Human Rights (Law on Human Rights).
[16]Article 23 para (1), 43 para (1) and 44 Law on Human Rights.
[17]Article 68 Law on Human Rights.

The above provisions acknowledge the civil and political rights of all people, citizens or workers, regardless of their sexual orientation. On the other hand, they also have the same responsibility in carrying out civil and political obligations. Even though protection for LGBTI is not affirmed in any regulation, every LGBTI people must enjoy the rights, because they are a part of "every citizen/worker/ everyone".

Furthermore, Indonesia has ratified the International Covenant on Civil and Political Rights and ratified it through the Law of the Republic of Indonesia Number 12 of 2005 concerning The Ratification of the International Covenant on Civil and Political Rights (ICCPR). Article 2 paragraph (1) expressly states that " Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status". This means that the protection of civil and political rights must be applied equally, regardless of their sex or other statuses. This provision regulates prohibition of discrimination based on "sex […] or other status" in article 4 paragraph (1), article 24 paragraph (1) and article 26 of the ICCPR. In Indonesia, "sex" is only interpreted as binary, i.e. male and female[18]. Therefore, non-discrimination based on sex will be implemented as non-discrimination between males and females. No other sex or sexual orientation is acknowledged in Indonesia. Therefore, another possibility to cover LGBTI in ICCPR protection is under the "other status" classification. Indonesia does not have any interpretation of the "other status" terminology. If we look at Toonen v. Australia[19], whether sexual orientation will be covered in the "other status" terminology, the International Covenant on the Human Rights Committee introduced four parameters of examination:[20]

- whether the national laws draw a distinction on the basis of sex or sexual orientation;
- whether someone is a victim of discrimination;
- whether there are reasonable and objective criteria for the distinction; and
- whether the national laws are a proportional means to achieve a legitimate aim under the Covenant.

Under the Indonesian context, those parameters examination will be difficult to do, because in Indonesian Law there is no legislation concerning sexual orientation at the national level. There is no recognition nor objection against LGBTI. This floating policy raised criticism because it can be interpreted differently and create legal uncertainty. The writer believes that however diverse the understanding about whether LGBTI is within the terminology of "other

[18]Article 64 para (1) Law No. 23 of 2006 on Population Administration.
[19]The court decision is available at: http://hrlibrary.umn.edu/undocs/html/vws488.htm.
1.1.1 [20]Paragraph 6.10. It is reported at Toonen v. Australia.

status", the bottom line is discrimination or criminalization of LGBTI must be considered as a violation of ICCPR[21].

Meanwhile, at the regional level, some regional legislations criminalise LGBTI. Article 14 letter i Tanjungpinang City Regional Regulation No. 7 of 2018 concerning Amendments to Regional Regulation no. 5 of 2015 concerning Public Order regulates, "Every person is prohibited from engaging in and/or being reasonably suspected of having had same-sex relations in open spaces and/or closed spaces." It is clear that in Tanjungpinang, the capital of Riau Islands Province, there is affirmative rejection against LGBTI. Furthermore, Article 11 paragraph (1) letter f Karawang Regency Regional Regulation No. 4 of 2016 concerning Child-Friendly Districts Implementation states, "Every child has the right to special protection rights, including protection from the effects of sexual disorientation." Karawang is a city in the West Java Province. The government in this regency determined LGBTI as sexual disorientation. In this area, the majority of heterosexuals with the binary mainstream are the standard group of society, while the minority homosexuals with the non-binary stream are inappropriate and unacceptable. They have a bad impact on children's mental development, which is expected to be heterosexual male or female. Another regional legislation is West Sumatra Province Regional Regulation No. 8 of 2019 concerning Social Welfare Implementation. It creates data on People with Social Welfare Problems. In this data, one of the classifications is a minority group[22]. In the Elucidation of Article 5 paragraph (2) letter o, the coverage of minority group is "non-dominant individuals or groups with specific national, ethnic, religious or linguistic characteristics that are different from the majority of the population, such as transexuals, gays and lesbians". Based on this Regional Regulation, transexuals, gays and lesbians are classified as "people with social welfare problems"[23]. The Chief of the National Commission on Human Rights at that time, Mr. Taufan Damanik, during his meeting with the Governor of West Sumatra on 14 February 2019 declared that "The people of West Sumatra have customs that cannot be separated from Islam. This has been around for a long time. Suppose the community and government here [in West Sumatra] make regulations prohibiting LGBT behavior because it is not following the customary law. In this case, the prohibition of LGBT is not wrong or violates human rights".[24] Furthermore he said "People from outside West Sumatra do not understand the human rights perspective from Minangkabau which is under traditional norms and customs, so that in the end there is a monopoly of perspective. Moreover, that would be impossible if an international human rights perspective were forced to apply to West Sumatra. Indonesian regions are diverse. Let the perspectives be different, the important thing is that violence and discrimination do not occur".[25] Those regional regulations showed how the influences of Islamic Law and Customaty (*Adat*) Law

[21]Human Rights Council, Implementation of General Assembly Resolution 60/251 of 15 March 2006.
[22]Article 5 paragraph (2) letter o of West Sumatra Province Regional Regulation No. 8 of 2019.
[23]Chapter II, Articles 4 and 5 of West Sumatra Province Regional Regulation No. 8 of 2019.
[24]Tirto.id, *KOMNAS HAM* (2019).
[25]*Ibid.*

Institute for Criminal Justice Reform criticised this statement. For implementing ICCPR using Indonesia's context, it referred to Article 27 paragraph (1) of the and Article 28D paragraph (1) of the 1945 Constitution, which emphasises that every citizen has the same position before the law and the government, has the right to recognition, guarantees, protection, and fair legal certainty as well as equal treatment[26]. The prohibition of LGBTI violates not only ICCPR, which is legally binding for Indonesia but also violates Indonesian human rights recognised by the 1945 Constitution.

Rights to Security of LGBTI

Apart from the Articles in the 1945 Constitution described above, the rights to security in Indonesia can also be found in several regulations. One of the most important regulations is Law No. 39 of 1999 regarding Human Rights (hereinafter - Law on Human Rights), which specifically regulates the issue of the right to security in Section Six, Articles 28 to 35 concerning the Right to a Feeling of Security. If we summarise, the most important parts of these articles are that "Everyone has the right to asylum and political protection from other countries[27], everyone has the right to protection for themselves, their families, honor, dignity, and property rights[28], everyone has the right to a sense of security and peace from all threats[29]; the residence of all people may not be disturbed, entered, or stepped on against the will of the person concerned[30], everyone has the right to be free from torture, punishment, or treatment that is cruel, inhuman, degrading, and human dignity and free from enforced disappearance and loss of life[31], everyone may not be arrested, detained, tortured, ostracised, exiled, or disposed of arbitrary authority[32], everyone has the right to live in a peaceful, safe, and secure social and state order that respects, protects, and fully implements human rights and basic human obligations"[33]. These articles expressly give everyone the right to obtain security, from various violence against life, politics, honor, and comfort. Even further, everyone has the right to protection of the confidentiality of their identity as a claimant[34]. Thus, LGBTI people should also be protected by these articles and have these rights. Impliedly the Indonesian Human Rights Law recognises LGBT's rights even though there is no affirmative protection in the law.

[26]Institute for Criminal Justice Reform, *ICJR Kritik Pernyataan Komnas HAM tentang Pelarangan LGBT Tidak Melanggar HAM* [ICJR criticizes National Commission on Human Rights's statement regarding the LGBT ban not violating human rights]. https://icjr.or.id/icjr-kritik-pernyataan-komnas-ham-tentang-pelarangan-lgbt-tidak-melanggar-ham/. https://icjr.or.id/icjr-kritik-pernyataan-komnas-ham-tentang-pelarangan-lgbt-tidak-melanggar-ham
[27]Article 28 Para (1) Law on Human Rights.
[28]Article 29 Law on Human Rights.
[29]Article 30 Law on Human Rights.
[30]Article 32 Law on Human Rights.
[31]Article 33 Law on Human Rights.
[32]Article 34 Law on Human Rights.
[33]Article 35 Law on Human Rights.
[34]Article 92 Law on Human Rights.

Social and Cultural Rights

Article 14 of the Human Rights Law expressly recognises that everyone has the right to communicate, obtain, store, process, and convey information needed to develop his personality and social environment. Furthermore, Article 32 of the Law on Human Rights also emphasises that the contents of information and communications made either through correspondence or electronic means may not be disturbed, except on the orders of judges or other legitimate authorities following the provisions of the law. Thus, it is also clear that LGBTI people also have the right to enjoy the right to communication and information, which is carried out using secure media and confidentiality can be guaranteed, except when ordered by a judge or other lawful authority, the contents of the information and communication are required for certain purposes.

Economic Rights

One of the economic rights for LGBTI has been regulated in Law No. 13 of 2003 concerning Manpower. Article 5 of this law states that "every worker [sic: including LGBTI workers] has the same opportunity without discrimination to get a job". It was further emphasised that "every worker/laborer [sic: including LGBTI] has the right to receive equal treatment without discrimination from employers". This provision guarantees LGBTI rights to access work and receive equal treatment with heterosexual male or female workers. This article stipulates that the rights of job seekers and workers are protected from anyone. Thus, the coverage of manpower can be anyone, regardless of their sex or sexual orientation.

Another example of economic rights is related to the ownership of goods. It is emphasised in article 574 of the Civil Code that "the owner of the goods [sic: including the owner of the goods who are LGBTI] has the right to demand that anyone who controls the goods, to return it in its original condition". Furthermore, Article 31 of the Law on Human Rights stipulates that one's residence cannot be disturbed. This is also binding for LGBTI, so they have the right to enjoy their privacy in their residence.

LGBTI Rights in the Marital Law

LGBTI rights in family law are protected by Article 28B paragraph (1) of the 1945 Constitution, "Every person shall have the right to establish a family and to procreate based upon lawful marriage". Thus, all residents of Indonesia, including LGBTI people, will enjoy the right to form a family. However, in reality, the rights of LGBTI in Article 28B paragraph (1) of the 1945 Constitution are undermined by Law No. 1 of 1974 concerning Marriage. Article 1 of the Law emphasises that "Marriage is an inner bond between a man and a woman as husband and wife to form a happy and eternal family (household) based on Belief in the One God". Based on that provision gays and lesbians will not be able to get married, because an Indonesian marriage is a heterosexual relationship.

Furthermore, Article 2 paragraph (1) of the Law on Marriage states "Marriage is valid, if it is held according to the parties' religion and belief."

Currently, Indonesia recognises the state's official religion through Law Number 1/PNPS/1965 and Law Number 5 of 1969 concerning The Prevention of Religion Abuse and Blasphemy. The regulation was implemented through Government Regulation No. 55 of 2007 concerning Education on Religions and Religious Study. In Article 9 paragraph (1), the Government Regulation recognises that "Education on religions includes Islamic, Christian, Catholic, Hindu, Buddhist and Confucian religious education". With this regulation, it is emphasised that the 6 (six) religions are accepted as the official religion of Indonesia. Thus, Article 2 paragraph (1) of the Marriage Law has the effect that only people who can legally get married based on one of these religions, whose marriage can be considered valid.

The problem is: that in 2016 no single religion, out of the six official religions, allowed same-sex marriage. On 16 February 2016, even the Catholic religion stated that it rejected LGBTI behavior, although it emphasised that they should not be alienated[35]. They need to be rehabilitated for their missbehaviour so that they return to normal, said the religious leaders, including the Chair of the Indonesian Ulema Council (MUI) Religious Harmony Division, Yusnar Yusuf, Executive Secretary of the Commission for Justice and Peace of the Indonesian Bishops' Conference (*Konferensi Waligereja Indonesia*-KWI) Romo PC Siswantoko, Chairperson of the Widya Sabha representative of Indonesian Buddhists (Walubi) Mpu Suhadi Sendjaja, and General Chairperson of the Indonesian Confucian Council of Religion (Matakin) Uung Sendana in a press conference at the Central Office of the Indonesian Ulema Council (MUI), Jakarta. They also reject the legalization and propaganda of LGBT activities in society and urge the government to immediately take a stand[36]. By taking into account the attitude of the prevailing religious leaders in Indonesia, it is clear that marriage between people of the same sex is currently impossible.

However, Pope Francis decided in 2023 that same-sex marriage might be blessed. It is not the same as the blessing associated with the sacrament of marriage. While it opens the couple's lives to God, this blessing does not provide legitimacy. It implores the power of the Holy Spirit to live the Gospel ideals more faithfully[37]. Therefore, based on this value, we cannot claim that the Catholic church will acknowledge the validity of a Catholic same-sex couple's marriage. Consequently, it will not affect the right of Catholic LGBTI people to get married in Indonesia, because as long as the Catholic church does not legalise their marriages, those marriages cannot be validated by the Office for Civil Registration.

The description above applies to same-sex marriages. The question is, what about marriage for bi-sexuals? Adhering to the provision that so far marriage in Indonesia is not possible for people of the same sex, it is best if a bi-sexual person

[35]UCAN Indonesia (2018).
[36]Sindo Daily (2016).
[37]Dicastery for The Doctrine of The Faith, Declaration of *Fiducia Supplicans* on the Pastoral Meaning of Blessings.

wishes to formalise his relationship into a legal marriage relationship, then he chooses to do so with a partner of the opposite sex. Even if he is bi-sexual, once he has decided to marry someone of the opposite sex, then that person's marriage can be legalised, as long as it fulfills the requirements and procedures stipulated in the Marriage Law and its implementing regulations.

Further, we need to examine the authority to marry a transgender person and an intersexual person in Indonesian law. These two groups only have a better position in Indonesian law if they get a surgical "correction". When someone has determined their sex, even if this happens because someone changes their sex (for example, at birth someone is recorded as male, but then changes their sex to female through a surgery procedure), the new status can be officially registered through an application to the District Court. As long as the request has been granted by the Court, the sex change will be legally recognised. As a juridical consequence, they can marry a person of a different sex from their last registered sex at the District Court.

Several cases related to the recognition of the legal status of transgender had been decided by several District Courts in Indonesia. The judges considered the physical and psychological condition of the applicant in granting the request. In the Court Decree No. 20/Pdt.P/2009/PN.Ung, Sofwan Dahlan (a medical doctor), the expert witness in this case, used 5 (five) considerations to determine whether a person is considered suitable for changing sex, i.e. chromosomal aspects, primary reproductive organ aspects, secondary reproductive organ aspects, hormonal aspects, and psychological aspects. Nevertheless, the judges decided 3 (three) aspects in determining the real sex of the transgender, i.e. "chromosomal aspects, secondary genitalia aspects, and psychological aspects"[38]. This Court Decree provided the clearest indicators to determine the possibility of having surgery and to change the sex status. Nevertheless, some Court Decrees did not have the same indicators to decide. Some examples of Court Decrees regarding this transgender issue are as follows:

a. The Bantul District Court Decree No: 22/ Pdt. P/2003/PN. Btl regarding the change in gender status of Suratini, who was registered as a woman at the time of birth. This Decision was based on the results of a physical examination by a doctor, which stated that Suratini had a congenital disorder of the genitals called hypospadias. As a result, Suratini had separate testicles, and there was a bent-down penis separated the testicles. She also never got her period, had no breasts, and had no vaginal opening. However, Suratini did not have a prominent Adam's apple. Under these conditions, he was granted to change his status to become a man and change his name to Suratno Adi Legowo. He also performed surgery to perfect his physique to become a real man. This Decision does not have chromosomal and psychological considerations.
b. The Jayapura District Court Decree No. 12/Pdt.P/2010/PN.JPR regarding Alterina Hofan, who was registered as a woman at birth, to become a man

[38]Asmawati (2013).

after going through the surgery process. That person had Klinefelter's syndrome. In conclusion, he was a male because most of his cells had X chromosomes, but his genitals became unclear from birth. He grew up as a human who has a penis but also has breasts. Before changing his status to a man, Alter had breast removal surgery. This decision uses chromosomal and secondary genitalia considerations and does not have psychological considerations.

c. Semarang District Court Decree No. 3077/Pdt.P/2011/PN.Smg regarding Siti Maemunah, who was registered as female at birth then requested to change her gender status to male and change her name to Mohammad Prawirodijoyo. The person concerned had deformities of the reproductive organs, i.e. no breasts, no testicles, a small penis size with an inward position, and a split testicular sac that was shaped like a vagina. However, in the laboratory examination, it was found that the person concerned had a chromosome type of 46XY, which meant that the karyotype number of chromosomes corresponds to the number of male chromosomes. This Court Decree does not have psychological consideration.
d. Ungaran District Court Decree No: 518/Pdt.P/2013/PN.Ung. regarding Supriyati, who at the time of birth was registered as a girl and then changed her status to a boy with the name Bagus Supriyanto. One of the considerations for granting Supriyati's request was the finding that Supriyati had a chromosome showing 46 XY and a high testosterone hormone of 1053 ng/dl indicating 100% generally male. Furthermore, there was information from a psychiatrist who explained that if Supriyati was forced to become a woman, she would experience prolonged depression. Before the change in gender status, Supriyati had undergone surgery 3 (three) times to perfect her physique as a man. This Court Decree does not use secondary genitalia consideration to decide.

The four decisions above show clear considerations to grant the request for the sex change legal status. However, we must also analyse the Batang District Court Decree No. 19/Pdt.P/2009/PN.Btg concerning the sex change of a man named Agus Widoyo. He filed validation of a sex change status to a woman named Nadia Ilmira Arkadea. Since childhood, Agus had grown up with the physical characteristics of a woman, even though he was registered with the legal status of a man. To make himself fully a woman, Agus underwent surgery, which caused his physical condition to appear as a woman. In this Court Decree, no chromosomal or secondary genitalia considerations are applied. It is different than the Court Decree discussed previously. Supposedly, a Court Decree must have clearer criteria and considerations other than just everyday physical appearance. For Indonesian Courts, this consideration is very necessary, to avoid the sex change done solely because of the wishes of the applicant, and not because of physical and mental needs, triggered by an intersexual condition experienced by someone.

Legal Consequences of Sex-Change Status

The sex change acknowledgment by the Court Decree must be followed with administrative legal action. Law No. 23 of 2006 concerning Population Administration which was later amended by Law No. 24 of 2013 concerning Amendments to Law No. 23 of 2006 concerning Population Administration (hereinafter referred to as the Adminduk Law). Article 3 of the Adminduk Law confirms that "*Every Resident is obliged to report Population Events and Important Events that they experience to the Implementing Agency by fulfilling the requirements in Population and Civil Registrations*." The question is whether sex change can be categorised as part of "population events" and "important events" that must be recorded. Article 1 number 16 of the Adminduk Law confirms that "*Civil Registration Officials are authorised to record Important Events experienced by a person at the appointed implementing authority by the provisions of the Legislation*". Thus, as long as the actions committed fall into the "important events" or "population events" category, any change must be recorded.

Article 1.17 of the Adminduk Law confirms that "important events" are "*events experienced by a person including birth, death, stillbirth, marriage, divorce, child recognition, child validation, child adoption, change of name, and change of citizenship status*". From the scope of "important events" or "population events" above, it is clear that this change in sex status is not included in these events.

To find whether a sex change status must be officially recorded, we must check Article 56 paragraphs (1) and (2) of the Adminduk Law. It stipulates that the registration of "other important events" is carried out by the civil registration official at the request of the resident concerned based on an in-forced District Court Decree. Further, what is meant by "other important events" in that Article? Based on the Elucidation of Article 56 paragraph (1) of the Adminduk Law, which explains: "What is meant by "other important events" are events determined by the District Court to be registered by the implementing authority, including a sex change status." This is also reaffirmed by Article 97 paragraph (2) of the Presidential Regulation of the Republic of Indonesia Number 25 of 2008 concerning Requirements and Procedures for Population and Civil Registration, which also includes sex change status as an important event that must be recorded. Thus, to make a sex change status legally binding, it must be granted by a District Court Decree, and it must be registered with the Civil Registration Officer. After the sex change status, the person has the right to get married to another person with an opposite sex status.

National Law and Religious Law Intertwined

As a country with the biggest Muslim country in the world, even though Indonesia is a state law and neither Sharia law nor customary law is acknowledged

as part of the hierarchy of law[39], non-neutral matters are influenced by custom, tradition, or religion[40]. Furthermore, registration of Indonesian Muslim marriage and many other family law matters must be done in the Office for Religious Affairs. If there is any specific dispute in Family Law involving Indonesian Muslims, the case will be settled by the Religious Court. Therefore, Sharia Law is applied to settle disputes by the Religious Court. To understand the influence of Sharia Law on LGBTI issues, we must study Religious Court Decree No. 0142/ Pdt.P/2020/PA.Sdn. The case did not involve the LGBTI issue. Nevertheless, in the legal consideration of the judges when they must determine whether the parties had legal capacities to get married (in this context the sex of the parties were male and female), they applied *argumentum a contrario* to argue that the parties did not have legal obstacles to get married. The reference was the Book of al-Bajuri, Juz II, which mentioned that "[... From the male side, he must be a real man and from the female side she must be a real woman. A marriage with a transgender is not exist, even though it is obvious his masculinity". Based on that reference we can conclude that the judge determined transgender as an obstacle to getting married and considered the parties in a marriage to be only male and female, no Indonesian Muslim transgender can get married. In this case, religious law is in parallel with the national law.

Shifting Paradigm?

In general, Indonesian Law protects LGBTI people, except in the marital law (especially for gays, lesbians, and transgenders). Yet the right to get married is enjoyed by transsexuals who have already gone through surgery, to get a Court Decree to grant a permit to change their sex status, to register their sex change status in Population and Civil Registration, and to get married to a person of their opposite sex. By including human rights in the amendment of Indonesia's 1945 Constitution on 18 August 2002, many human rights of everyone, including LGBTI people, are recognised. Nevertheless, the recent development showed a setback phenomenon.

Purwokerto District Court Decree No. 30/Pdt.P/2022/ PN Pwt had refused a request for a sex change status by Faqih al Amien, a male at birth. He had had surgery to change his reproductive organ from male to female, even though before the surgery, a prior chromosomal test No. Reg. Lab: 85/XI/2019 at Dr. Sardjito Hospital had been done and it showed that he had 46/cel (from the counted 25 cells). 7 cells were analysed. The karyotype was 46, XY. It proved that he was a male. Furthermore, from the endocrinal test, there was no genotype, phenotype, or hormonal function abnormality in his body. The medical doctor took the surgery based on his psychiatric consideration, i.e. he suffered from transsexualism, emotional instability, and DD/Cyclothymia, and his clarity to prepare for the surgery (mentally and financially). The judges rejected the request because of the result of those chromosomal and endocrinal tests. Consequently, recently there has

[39]Article 7 paragraph (1) Law No 12 of 2011 regarding Lawmaking. See Susanti & Sebastian (2017) at 116.
[40]Susanti & Sebastian (2017) at 119.

been even more contradiction in the Faqih al Amien's identity because his sex status is male while his physical appearance is female. This judge's decision is widely criticised. Recently there has been a legal vacuum regarding the procedure and requirements of the sex change surgery. Because of that legal vacuum, the judges just used the biologist consideration concluded from some previous Court Decrees. As a country with civil law tradition, Indonesian people rely on legislation rather than Court Decrees or Decisions. Therefore, many people think this decision will be unfair to the requesting person.

There is another setback in the right to freedom of expression implementation, On 26 February 2016, the Indonesia Broadcasting Commission (KPI) sent Circular Letter No. K/KPI/02/16 to all television broadcasters, which prohibited them from showing feminine male hosts, talents, or other performers, which are demonstrated by their feminine clothing style, make-up, gestures, speaking style, designating call, promotion of a man to behave effeminately, and using typical terms and expressions often used by transgender. For example, an Indonesian comedian namely Tessy Srimulat (his original name is Kabul Basuki) who acted as a transgender had been banned from performing in any television program. He got depressed and was jailed due to misuse of drugs. He did not have any job for more than six years. He must sell his property to survive[41]. Therefore, to a certain extent, freedom of expression for transgenders is a myth in Indonesia.

LGBTI people do not have a right to work as a public servant. Without any affirmative protection for the economic rights of LGBTI people, it can threaten their capacity to access it. For example, Ministry of Internal Affairs Regulation No. 11 of 2020 on Public Servants' Uniform in the Ministry of Internal Affairs and Regional Government indicates that public servants are only males and females. No transsexuals may work as public servants, because all public servants must wear uniforms either for males or females. Furthermore, they must choose to perform in a specific pattern, such as cutting their hair short and neat as a male[42] and wearing a male or a female uniform. Thus, the right to work in the public sector is not enjoyed by transgenders.

Need Affirmative Action?

If we look at the provisions discussed in the previous section, it is clear that the rights of LGBTI are derived from general provisions. Because various rights are granted to "everyone", these rights are automatically granted to LGBTI, who are included in the term "everyone". This then raises the pros and cons. On the one hand, supporters of LGBTI rights think that the government is not strong enough to protect LGBTI, with no explicit protection specifically for LGBTI. The law can be interpreted differently in the community. On the other hand, religious leaders and conservative groups want the government to control the LGBTI people as

[41]Sari (2022).
[42]Article 25 (b) of the Ministry of Internal Affairs on Public Servants' Uniform in the Ministry of Internal Affairs and Regional Government.

much as possible, and even carry out rehabilitation for them[43]. LGBTI people are seen as an obstruction in the community.

What is the possibility of protecting LGBTI rights through affirmative action in the Indonesian legal system? To answer this question, we must pay attention to the following considerations:

a. Pancasila as the Foundation of the State
   As previously explained, Pancasila is the foundation of the Indonesian state, which inevitably must become Indonesia's guide in the law-making process. The first *sila* of Pancasila (that is implemented by the marital principle in the Law on Marriage does not allow LGBTI people to have the right to have a family. Therefore, the application of this affirmative action can be limited only to neutral rights (not influenced by culture or religion), which cover civil and political rights, the right to security, and economic and social rights.
b. Proportionality
   Implementing affirmative action on LGBTI rights means that laws governing these rights will specifically and strictly address the rights of LGBTI people. One example of its formulation is as follows:
   "Every employer is obliged to provide equal opportunities to LGBTI people to access employment opportunities and to be employed in positions based on their qualifications and certifications".
   Such a formulation will bring up very sharp pros and cons in Indonesia. It has the potential to open conflicts in society. In 2022, a US Special Envoy to discuss the rights of LGBTQ, Jessica Stern, canceled her visit to Indonesia because of objections from many parties. Mr Anwar Abbas, the vice chairman of the Indonesian Ulema Council (the biggest Muslim organization in Indonesia) stated that "Indonesia cannot host guests who have a mission to support LGBTQ. It will destroy and ruin the noble values of the Indonesian cultures and religions"[44]. This objection was affirmed by the vice chairman of the Indonesian House of representative, Dr. H. M Hidayat Nur Wahid, MA[45], which used Article 28J paragraph (2) of the 1945 Constitution as his reference:

   > "*In exercising his rights and freedoms, everyone is obliged to comply with restrictions established by law for the sole purpose of ensuring recognition and respect for other people's rights and freedoms, and to fulfill fair exigences by considering morality, religious values, security, and public order in a democratic society*".

He emphasised human rights applications must consider the local context, especially the religious and social conditions of the community as well as the legal

[43]Sindo Daily (2016).
[44]Tarigan (2022).
[45]*The Indonesian People's Consultative Assembly.*

system that applies in each community.[46] The Indonesian House of Representatives had supported this standing. Mrs. Kurniasih Mufidayati as a representative stated that "The LGBTQ values that the US envoy will promote are contrary to the values of the first *sila* of Pancasila "the belief in the one and only God", because all religions in Indonesia do not embrace LGBTQ behaviour"[47].

The discussions above showed the strong rejection of the LGBTI existence. Surely it will be more intense repudiation against the protection of the rights of LGBTI people. Therefore, asserting the rights of LGBTI people through affirmative recognition in the legislation seems impossible. It will have a more negative social impact on Indonesian society. This argument arises not only because LGBTI people are minorities, so the negative effects of their demands will be more easily suppressed, but also because in fact, LGBTI people can already use the existing laws to uphold their neutral rights (from the limits of religion and custom. Implementing affirmative action will cause more social disunity than sticking to the *status quo*. Therefore, for now, using affirmative action to protect LGBTI rights in Indonesia is disproportional. It may trigger social tensions in the community.

Conclusion

This section will briefly answer the formulation of the problem stated in the previous section, namely "Can LGBTI be considered "full legal subjects", having the same rights aszw heterosexual-oriented groups in society? Or are they (in specific rights) only considered as "pseudo-legal subjects", who do not have the same rights as heterosexuals? Is there any shifting paradigm in Indonesia as the biggest Muslim country in the world in protecting LGBTI people?"

From the above analysis, it can be concluded that there are two groups of protections for the rights of LGBTI people in Indonesia:

a. In neutral rights (no religious or custom restrictions), LGBTI rights are protected the same as the rights of males or females with some exceptions, such as having no access to work as civil servants.
b. However, regarding the right to have a family, only transsexual and intersexual groups are given the right to enter into a legal marriage, as long as they must get surgery to correct their sex organs, their sex change status must be granted by a District Court Decree, the sex change status must be registered with the Civil Registration Officer, and their spouse has the opposite sex. Indonesia recognises only binary marriages between males and females. It means that homosexuals (lesbians and gays) are pseudo-legal subjects in the field of marital law.

[46]The Indonesian People's Consultative Assembly.
[47]*The Indonesian House of Representatives.*

Indonesia made good progress in protecting the human rights of its citizens in 2002 when the protection of human rights was explicitly recognised and absorbed in the Amended 1945 Constitution. In general, the human rights of LGBTI people are also protected by the Constitution, because it applies to "everyone". However, protection for LGBTI people fluctuates and goes up and down. When there was a movement to affirm LGBTI rights in 2015 and 2022, powerful opposition emerged in society. From the angle of the shifting paradigm in society, it seems that currently, it is shifting to a more conservative direction, which is done by rejecting the existence of LGBTI. The influence of religious values (especially Islamic values) recently more intensively affected many aspects of Indonesian society. Based on Pancasila and religious values deliberation, the Indonesian People Consultative Assembly and the Indonesian House of Representatives are openly opposed to the existence of LGBTI. Therefore, Indonesian LGBTI people must go to a long and tiring effort to fight for their rights and protections, as long as this standing is still maintained.

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The Principles of the Insolvency Procedure in Romania

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The insolvency law in Romania is one with tradition, its first form being adopted in 1995. At that time, although no principles were expressly stipulated to govern this procedure, they could somehow be deduced from the interpretation of the legal norms. The legal consecration of the principles of the insolvency procedure can only be found in Law No. 85/2014, still in force today. It should be mentioned that Law no. 216/2022 amended the legal rules regarding the principles applicable to insolvency. These principles can be summarised as follows: encouraging negotiations regarding the prevention of insolvency, maximising the debtor's wealth, enabling effective restructuring, efficiency, reasonableness in the procedure, insolvency of the creditor mass, transparency and predictability, pro rata and pari passu rules, credit risk limitation, the superpriority of financing in the procedure, a representative and fairly assumed reorganisation plan, useful and efficient capitalisation, procedural coordination in the matter of the group of companies and legality control.

Keywords: *Insolvency; Principles; Rules.*

Introduction

In the history of Romanian law, after the year 1800, we find empirical regulations regarding insolvency. Under the Calimach Code of 1817, bankruptcy applied to both merchants and non-merchants, being called, in art. 1974, "creditors' course order". The provisions regarding bankruptcy in this normative act ("About lying liars"), quite embryonic, contain definitions of terms such as: the creditor's table or the creditors' committee.

The Caragea Code of 1818 regulated bankruptcy in Part III, Chapter VIII, "For borrowing and debt". According to the bankruptcy provisions of the Caragea Code of 1818, if the court found that the debtor's damages were "established", and they were the result of the circumstances and not his/her act, then the creditors could grant the debtor "mercy", otherwise he/she would be judged for fraudulent bankruptcy.[1]

The "*Condica pentru comerciu*", adopted in 1840, is considered the first complete Romanian bankruptcy law, representing a translation of the bankruptcy provisions from the French Commercial Code, as amended by the Law of May 28, 1838. This regulation was applied in Muntenia, and from 1864 also in Moldova.[2]

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[1]About bankruptcy in the old Romanian law, see Atanasiu & Răţoi (2007) at 75-77.

[2]Cărpenaru (1996) at 9.

The Romanian Commercial Code from 1887 regulated the bankruptcy procedure in Book III - About Bankruptcy (art. 695-888) and Book IV, Title I, Chapter III – Special procedural provisions in bankruptcy matters (art. 936-944)

Although in 1938 a new draft commercial code was developed, it was never applied, in fact, the old code continued to function until 1946-1947 when the communist structures replaced it almost entirely with economic legislation appropriate to the economy of a planned state. Although the provisions of the Commercial Code of 1887 were not repealed, they were applied only to foreign trade enterprises by the Bucharest Chamber of Arbitration, and in internal commercial relations, in the relations between mixed companies established in the country and foreign trade enterprises. [3]

After the Revolution of 1989, which reinstated the market economy, the Commercial Code regained its status as common law in relations between traders.

The first modern regulation of commercial insolvency, specific to a market economy, can be found in Law no. 64/1995 regarding the reorganisation and bankruptcy procedure[4].

The unprecedented development of commercial activity in Romania as well as the prospect of joining the European Union[5] led the legislator to reform this institution by adopting Law no. 85/2006 regarding the insolvency procedure[6]. Law no. 85/2014, still applicable today with a series of amendments, was intended to be an Insolvency Code, with the idea of encompassing all the legal provisions on insolvency. This objective, however, was not achieved, as the insolvency of natural persons or the insolvency of territorial administrative units are currently regulated in other documents. It was only in 2015 that the Romanian legislator prioritised the necessity of harmonising the national legislation with the European one and of adopting the Law of Insolvency of Natural Persons No. 151[7].

The principles of the insolvency procedure were also shaped over time, following the legislative evolution in the field of insolvency in Romania.

The Evolution of Legal Regulation

Law no. 64/1995 was, in Romania, the first distinct legal regulation aimed at debtors in financial difficulty, and which proposed two solutions: either judicial reorganisation or bankruptcy. This law did not expressly contain an enumeration of the principles applicable in insolvency. Interestingly, the principles of this procedure were not of interest to doctrinaires for about 5 years. Researching the

[3]Vonica (1991) at 3.

[4]Law no. 64/1995 was published in the Official Gazette of Romania no. 130 of June 29, 1995, and entered into force on August 28, 1995. This law is currently repealed.

[5]The European Commission's report on the progress made by Romania during 2004 in the process of joining the European Union stated that: 'the Romanian legal system does not provide for effective mechanisms for the exit of economic operators from the market'.

[6]Law no. 85/2006 regarding the insolvency procedure was published in the Official Gazette of Romania, Part. I, no. 359 of Aprile 21, 2006 and entered into force 90 days after the date of publication.

[7] Law no. 151/2015 published in the Official Journal of Romania No. 464 of the 26th of June 2015 and entered into force on the 1st of January 2018.

legal material[8] written in the period 1995-2000 on the matter of insolvency, we find that no attempt was made to draw guidelines in the matter of insolvency.

Only after the year 2000 did the first opinions appear regarding the existence of principles that can be derived from the legal text.

At the level of 2001[9], it is stated that the principles that govern the reorganisation and bankruptcy procedure are: the principle of speed of the procedure, the principle of maximising the value of the debtor's assets, the principle of active participation of creditors, the principle of the pre-eminence of the judicial reorganisation procedure over the bankruptcy procedure, the principle of the privileged treatment granted to the diligent debtor and honest.

Prof. I. Turcu[10] estimated in 2003 that from the analysis of the text of Law no. 64/1995 several fundamental principles can be identified: the principle of priority of the procedure over other debt recovery procedures, the principle of speed, the principle of collectivity, the principle of the primacy of reorganisation and the principle of maximising the recovery of debts. The same author[11], in 2006, added two more to the stated principles: the principle of continuity of the syndic judge and the principle of ordering the rank of claims. These were appreciated by the doctrine as guiding principles in the matter of insolvency.

Regarding the insolvency procedure, Law no. 85/2006, although very modern at its time, did not focus on the unequivocal establishment of principles to guide the judges and insolvency practitioners, maintaining the doctrinal task of identifying such principles.

Thus, legal texts with particular impact and importance in the insolvency proceedings were identified, so that they were considered as principles. In this context, four principles were identified: the principle of priority, the principle of speed, the principle of collectivity and unity, and the principle of maximising the debtor's wealth.

The principle of the priority of the insolvency procedure was expressed by the need to recover creditors' claims and cover the debtor's liabilities. From the date of the opening of the insolvency procedure, all individual prosecutions of the creditors against the debtor ceased. According to art. 36 of Law no. 85/2006 "from the date of the opening of the procedure, all judicial, extrajudicial actions or enforcement measures for the realisation of claims against the debtor or his assets are suspended by law". This provision prevented, from the date of the opening of the insolvency procedure, all creditors, equally, to individually obtain the satisfaction of their claim through any other method allowed by Romanian law. The suspension took place *ope legis* and determined the termination of any individual prosecution against the debtor in order not to harm the interests of creditors and to eliminate uncertainty about the amount of the passive mass. Observing the rigors of Law no. 85/2006 regarding the registration of creditors in the table of claims, the methods of valorisation of goods, the order of distribution of the amounts obtained, the insolvency procedure was regarded as a special

[8]Pătulea (1995); Turcu (1996); Țăndăreanu (2000); Turcu (2000); Bufan (2001).
[9]Schiau (2001) at 24-33.
[10]Turcu (2003) at 207.
[11]Turcu (2006) at 306.

enforcement one. Under these conditions, the principle of the priority of the insolvency procedure over other debt recovery procedures was affirmed. Although this principle is not expressly enshrined in Law no. 85/2006, the legislator to ensure its applicability, by art. 37 provided that the sentence opening the insolvency procedure will be communicated by the syndic judge to all the courts in whose jurisdiction is located the headquarters of the debtor, declared in the trade register.

Another principle emphasised by the doctrine was that of celerity. This principle can be found in paragraph (2) of art. 5 of Law no. 85/2006 which, referring to the bodies that apply the procedure[12], assigns them the task of carrying out all acts and operations with speed. Even if he/she did not enunciate it as a principle, the legislator was concerned with finding quick solutions for debtors in financial difficulty, constantly intervening in the modification of the legal text. By Law no. 169/2010, many procedural deadlines were reduced: the deadline for submitting claims declarations from 60 to 45 days, the deadline for verifying claims in the simplified procedure from 20 to 15 days, the deadline for verifying claims in the general procedure from 30 to 20 days, the appeal deadline from 10 to 7 days, the deadline for justifying the decisions issued by the syndic judge from 30 to 10 days, the deadline for drawing up the report on the causes and circumstances of the state of insolvency from 60 to 40 of days, etc. Since the commercial life has an alert rhythm, the speed specific to the commercial activity must be also present in the insolvency procedure. Achieving the goal of the insolvency procedure by covering the debtor's liabilities within a reasonable time allows the creditors to continue their activity and also prevents the extension of the state of insolvency to the debtor's partners. On the other hand, remaining in the system for a long period, some debtors in a state of insolvency, without their elimination or reintegration, maintain the blockage of the commercial relations in which they are parties, with the consequence of restricting the freedom of action and the degradation of the conditions of activity and for the other merchants[13].

The principle of collectivity and unity was extracted from the provisions of art. 2 in conjunction with art. 3 point 3 of Law no. 85/2006, according to which the insolvency procedure is a collective one, in which all creditors participate together in the pursuit and recovery of their claims. This principle is related to the nature of the insolvency procedure, which opposes the debtor and the mass of creditors, and provides for a unitary legal regime for each of the latter[14]. The effect of imposing this principle is that the insolvency procedure is related to the entire collective of creditors.

The principle of maximising the debtor's wealth results from the provisions of art. 86 paragraph (1) Law no. 85/2006 which provides that "in order to maximise the value of the debtor's assets, the receiver/liquidator may maintain or terminate any contract, unexpired leases or other long-term contracts, as long as these contracts are not fully executed or substantiated by all parties involved".

[12]Art.5 para (1) of Law 85/2006: 'The bodies that apply the procedure are the courts, the syndic judge, the judicial administrator and the liquidator'.
[13]Avram (2008) at 14.
[14]Avram (2008) 15.

Although this principle is regulated in the content of section IV - "The situation of some legal acts of the debtor", it must be taken into account that it applies both in cases of judicial reorganisation and in cases of bankruptcy, provided either by the general procedure, or the simplified one.

The principle obligates to carry out all the procedural steps related to the increase of the value of the debtor's assets so that, on the path of reorganisation or bankruptcy, the recovery of debts is maximised. The legislator has expressly provided provisions regarding the procedural steps in the application of this principle, such as the return to the active mass of the goods that have fraudulently left the debtor's patrimony, the stopping of losses from the debtor's wealth in the sense of denouncing some contracts, the recovery of the debtor's own claims. Also, an important role in maximising the debtor's wealth is played by the insolvency practitioner who, under the control of the creditors, holds the decisions regarding the management of the procedure.

From the regulation of the Law on insolvency procedure no. 85/2006, two specific rules were deduced, which, although not expressly mentioned by the legislator, are defining for the insolvency procedure: the principle of ordering the rank of claims and the principle of active participation of creditors.

In the specialised literature, we find only two opinions[15] that recognise the order of distribution of the amounts realised in the insolvency procedure as a fundamental principle.

The analysis of art. 121 of Law no. 85/2006 results with the order of payment to creditors differing according to whether or not the capitalised assets were encumbered by mortgages, pledges, or other movable real guarantees or retention rights of any kind[16]. In the conditions in which the creditors have constituted real guarantees on the assets of the debtor's estate, the legislator preserves the principles of common law according to which the creditor holding such a right has the prerogative to be satisfied with priority from the amount obtained as a result of the asset's capitalisation, the claim having rank immediately next to expenses incurred in the common interest of creditors.

Unlike secured claims, unsecured claims have a mandatory distribution order established by the legislator according to their importance from an economic, social, and legal point of view. In the insolvency procedure, the situation may arise that the sums intended to cover the claims are insufficient to satisfy all creditors, in which case the rule of proportionality is enshrined in art. 124 of Law no. 85/2006: "The amounts to be distributed among creditors of the same priority rank will be granted proportionally to the amount allocated for each claim [...]".

Taking these considerations into account, we assessed, at the level of 2013[17], that the manner and order in which creditors see their claims realised is one of the central aspects of the insolvency procedure with principal value.

Importantly, the principle of active participation of creditors was generated by the increase in the role of the assembly of creditors in the supervision of the

[15]Turcu (2006) at 302; Nasz (2009) at 125.
[16]For developments see Moțiu (2008) at 12; Bufan & Munteanu (2002) at 10 et seq.
[17]Iancu (2013) at 19.

activities carried out by the insolvency practitioner and the transfer of economic aspects to the competence of the creditors' committee.

The meeting of creditors approves the bankruptcy proposal made by the judicial administrator in the report on the causes and circumstances that led to the emergence of the state of insolvency[18], approves the valuation and method of selling the debtor's assets[19], analyses the final report drawn up by the insolvency practitioner[20], etc. Among the attributions of the creditors' committee we find: analysing the debtor's situation and making recommendations, negotiating with the insolvency practitioner who wants to be assigned to the case, learning about the reports of the judicial administrator or the liquidator, and challenging them if necessary, proposing taking reasonable measures, requesting the lifting of the debtor's right of administration, formulating actions for the cancellation of transfers of a patrimonial nature made to the detriment of creditors[21], etc.

The entirety of the creditors' attributions leads to establishing the defining role they have in determining all important decisions in the insolvency procedure. Although the legislator gives the possibility to the creditors to take managerial decisions under the aspect of opportunity regarding the debtor, they are free to choose an active or passive attitude in the insolvency procedure. Although creditors should show a special interest in the debtor's insolvency procedure, the jurisprudence at the level of 2010[22] revealed their passivity most of the time. The non-involvement of creditors in the insolvency procedure is not only quantified in the lack of information about their debtor but also leads to the prevention of the exercise of duties by the judicial administrator/liquidator and to the procrastination of the insolvency procedure.

Although the involvement of creditors is welcome in the insolvency procedure, its practical inapplicability and their possibility to stay passive without any legal sanction, led to the conclusion that the "active participation of creditors" cannot be raised to the rank of principle.

Thus, until 2015, the rules stated above, extracted by doctrine from the legal text and called principles, guided the insolvency procedures in Romania.

Principles Applicable in the Insolvency of the Professionals

Law 85/2015, still applicable today, on insolvency prevention and insolvency procedures expressly contains 14 principles listed in art.4. Thus, with the entry

[18]Art. 59 par.(4) şi art. 60 of Law no.85/2006 regarding insolvency procedure.
[19]Art. 116 par. (2) şi 117 of Law no.85/2006 regarding insolvency procedure.
[20]Art. 129 of Law no.85/2006 regarding insolvency procedure.
[21]Art. 17 par. (1) lett. a-f) of Law no.85/2006 regarding insolvency procedure.
[22]În file no. 937/30/2009 of Timiș Court, the liquidator convened the meeting of creditors three times to approve the capitalisation strategy of the debtors' assets; in file 1322/30/2009 of the Timiș Court, 11 months were needed for the communication of a point of view of the secured creditor on the reduction of the auction price of the asset affected by the guarantee; in file no.609/115/2009 of Caraș Severin Court, numerous addresses were sent to the majority creditor to participate or to communicate a written point of view regarding the agenda of creditors meeting, since in his absence the assembly was nonstatutory.

into force of this law, the principles were clearly expressed by the legislator, they no longer had to be extracted by doctrinaires from the legal text.

Maximising the degree of capitalisation of assets and recovery of debts (art. 4 point 1). This principle has been taken into account in the insolvency procedure since its first form in 1995. Although the law puts a lot of emphasis on the reorganisation procedure, the goal of the law "covering the debtor's liabilities" must not be forgotten, in a context in which the maximisation of the debtor's wealth must be pursued with the aim of satisfying the creditors, either by capitalising on the highest possible price, or by recovering the debtor's claims. In order to comply with this principle, all measures must be taken to prevent the premature and harmful dismemberment of the debtor's patrimony.

Giving debtors a chance for efficient business recovery, by maintaining economic activity and protecting jobs, by the debtor's effective access to early warning means, by means of insolvency prevention procedures or by judicial reorganisation proceedings, without prejudice to other recovery solutions (art. 4 pt. 2). The means of warning times are procedures recently introduced in Romanian legislation (2022) and involve alerting of the existence of circumstances that could give rise to the state of difficulty or insolvency of the debtor. In practice, access to all forms of informal recovery of the debtor is prioritised with the direct aim of maintaining jobs but also the debtor's activity in general.

Ensuring effective insolvency and insolvency prevention procedures, including through appropriate communication mechanisms and proceeding in a timely and reasonable manner, in an objective and impartial manner, a minimum of costs, likely to lead to the discharge of obligations (art.4 pt. 3). To achieve the purpose of the law, insolvency prevention, and insolvency procedures must be carried out with maximum efficiency, in a satisfactory period for both the debtor and the creditors, and with the lowest possible costs. This principle also emphasises the distinct nature of prevention procedures compared to insolvency procedures, the purpose of the first being the discharge of the debtor's obligations.

Ensuring equal treatment of creditors of the same rank (art. 4 point 4) Creditors of the same rank or of the same category will be treated without differentiation. In other words, creditors in the same category will benefit from equal and uniform treatment. It is valuable that this principle refers to the rights of the creditors in the procedure (the right to vote or the right to information) and less to the rules for the distribution of the collected sums that follow the rank of the creditors. In the category of secured claims, preference clauses must be observed, and within the same rank creditors will receive amounts proportional to the claim they hold in that category. So in these situations, the equal treatment of creditors is thwarted.

Ensuring a high degree of transparency and predictability in the procedures provided for by law (art. 4 point 5) The transparency of the ongoing procedures must accompany all participants in the insolvency procedure for clear and correct information on the debtor's situation. Carrying out the procedures in a transparent manner, respecting the legal deadlines, respecting the rights of the debtor as well as the creditors, and mentioning all the necessary and relevant information for all involved parties ensures predictability.

Protecting information of a competitive nature regarding the debtor's business, without hindering creditors' access to the necessary and relevant information that would allow them to adopt a decision in insolvency prevention and judicial reorganisation procedures (art. 4 pt.5^1) Newly introduced in insolvency law, this principle aims at the protection of competitive information related to the debtor's business. The debtor's creditors must have relevant information to make the right decisions regarding the debtor's situation, and his possibility to continue his business, but the protection of information of a competitive nature comes to protect the normal course of business of a debtor who has not reached bankrupt and intends to continue the business.

Recognition of existing rights of creditors and compliance with the order of priority of claims, based on a set of clearly determined and uniformly applicable rules (art. 4 pt 6) Since by the effect of the law, creditors are forbidden to recover their claims individually from the debtor, it is natural to respect the rights of creditors acquired before the opening of the insolvency procedure and to distribute the sums of money obtained during the insolvency procedure according to rigorous and uniform rules established by law for all creditors. The principle enunciated by art. 4 pt. 4 - ensuring the equal treatment of creditors of the same rank could be included within this principle since compliance with the order of priority of claims based on a set of clearly determined rules also implies the classification of creditors according to the rank of the claim and the application of uniform provisions in within each rank of creditors.

Limiting the credit risk and the systemic risk associated with transactions with financial instruments by recognising compensation immediately due in the event of the insolvency or insolvency prevention procedure of a co-contractor, having the effect of reducing the credit risk to a net amount due between the parties or even to zero when to cover the net exposure, financial guarantees have been transferred (art. 4 pt. 7) This principle is enshrined in art. 89 of the law and ensures the validity of operations carried out based on a qualified financial contract or of bilateral compensations with an insolvent co-contractor or insolvent guarantor of the co-contractor, being recognised as receivables in insolvency proceedings. The insolvency law also establishes other exceptions for qualified financial contracts, such as the impossibility of denouncing them, or the impossibility of declaring anticipated liability in case of bankruptcy.

Ensuring access to funding sources in insolvency prevention procedures, during the observation and reorganisation period, with the granting of an appropriate treatment, priority to payment, to protect these claims (art. 4 pt. 8) The stated principle unequivocally devotes priority to payment of the creditors who provide the financing of the debtor, the legislator indicating again the fact that he prioritises the formal or informal reorganisation of the debtor over the bankruptcy procedure. Most of the time, reorganisations are doomed to failure due to the lack of external financial support that is extremely necessary during the negotiations or the preparation of the plan. In practice, these financings are difficult to obtain because, although the law seems to ensure a super-priority for the payment of these creditors, in reality, they cannot satisfy the claims of secured

creditors, who will be paid in case of bankruptcy after the expenses of the procedure from the capitalisation of unsecured assets.

Basing the vote to approve the restructuring or reorganisation agreement/ plan on clear criteria, ensuring equal treatment between creditors of the same rank, recognition of comparative priorities and acceptance of a majority decision, with equal or higher payments to be offered to other creditors than he/she would receive in the case of the next optimal alternative or in bankruptcy, as the case may be (art.4 point 9). This principle clearly establishes the elements according to which the creditors will decide the fate of the debtor, i.e. if he is to be allowed a restructuring of business or if initiating bankruptcy is necessary. In practice, scenarios will be set up about the number of claims that will be collected by creditors at certain predetermined time intervals, with the continuation of the debtor's activity versus the sums of money that will be collected by creditors in a theoretically shorter time but by selling the goods in the procedure bankruptcy with the cessation of the debtor's activity.

Favouring in insolvency prevention procedures, the negotiation of the amicable renegotiation of debts and the conclusion of a restructuring agreement or, as the case may be, preventive arrangement, ensuring the continuity of the enterprise (art. 4 pt.10) We are in the presence of a new principle that reaffirms the legislator's intention to prioritise business restructuring over business recovery. The purpose of supporting the negotiation and renegotiation of receivables is clearly expressed, "continuity of the enterprise." The budget creditor is allowed to vote within an agreement to reduce his receivables provided that the private creditor test is performed.

Valorisation in a timely manner and in the most efficient manner possible (art. 4 point 11). Depending on each case, the method of timely capitalisation of the assets will have to be identified. Obviously, for perishable goods, the capitalisation will be urgent, some non-essential assets of the reorganisation can be capitalised to ensure the costs of the procedure, also in the reorganisation, the debtor's assets can be sold. The most efficient method of capitalisation will also be analysed by the creditors, respectively auction or direct negotiation. This principle can also be found in art. 4 point 1 - maximising the degree of capitalisation of assets, because an effective capitalisation also implies obtaining the best possible price to satisfy the creditors.

In the case of the group of companies, the coordination of the insolvency prevention and insolvency procedures, for the purpose of their integrated approach (art.4 pt. 12) The coordination of the insolvency prevention and insolvency procedures in the case of several companies that form a group involves cooperation appointed insolvency practitioners, the existence of a co-ordinating practitioner, interconnected reorganisation plans, all of which are intended to give business restructuring a chance.

The administration of insolvency prevention and insolvency procedures by insolvency practitioners and their conduct are under the control of the court, within the limits provided by this law (art. 4 pt. 13) This principle confirms the fact that the restructuring practitioner (notion introduced by adopting debtor's restructuring procedure) is the insolvency practitioner - a familiar notion in

insolvency law and that the syndic judge is the one who will have the control of the legality of the operations carried out, even if in the matter of insolvency prevention procedures the judge's intervention is rather reduced and punctual in certain moments expressly established by law.

The Principles Applicable in the Insolvency of the Natural Persons

Law no. 151/2015 expressly sets out eight guidelines that must govern any insolvency proceedings where the debtor is a natural person. These rules create the pillars on which this normative act was built, some of them taken from the principles of the insolvency procedure of professionals, others specific only to the insolvency procedure of natural persons.

The principle of recovery of the debtor in good faith. Art. 2 paragraph 1 of Law no. 151/2015 - granting bona fide debtors a chance to recover their financial situation, through a debt repayment plan - raises to the level of principle the granting of a chance to bona fide debtors to recover their financial situation, through a plan debt repayment. The idea of financial rehabilitation of the debtor governs the entire insolvency procedure, an aspect clearly stated by the legislator both in the definition of the purpose of the procedure (art. 1) and in the first principle. The possibility of staggered debts through the repayment plan with the perspective of erasing a portion of the debt have the role of supporting the natural person during the period of financial difficulty with the perspective of returning to the financial normality.

The principle of debt negotiation. The principle stated in art. 2 paragraph 2 – facilitating the amicable negotiation/renegotiation of claims and the conclusion of an agreement between creditors and the debtor on the debt repayment plan aims to find a balance between the interests of the debtor and the interests of the creditors, the latter being called to the negotiations table. The legislator does not limit him/herself to enumerating this principle, but also outlines the minimal framework in which this negotiation will take place. Thus, the negotiation period is 60 days, with the possibility of extending it by another 30 days if there are solid indications that an agreement will be reached. Also in support of the debtor, it is established that this conciliation procedure can also be carried out electronically, the legislator realising the difficulty of the personal participation of many creditors but also the fact that many times the decision-makers in the creditors' structure are not found at the local level. Conciliation meetings are not limited in number, but must take place within the period established by art. 27 of Law 151/2015. The finality of these negotiations will be recorded by the administrator of the procedure in a minute.

The principle of debt relief. Art. 2 paragraph 3 establishes, at the level of principle, the support of the debtor's exit from insolvency, including through the discharge of debts, under the law, systematically and rationally, so that the debtor is motivated to make efforts to carry out income-generating activities, to facilitate his/her reinsertion into the social environment and his/her contribution to the economic life of the community, according to the level of professional training

and accumulated experience. Through this principle, the legislator reiterates the good faith that must characterise the debtor throughout the insolvency procedure, who must generate income, according to his/her professional training, for the payment of creditors, the context in which the discharge of debts will also operate. The work carried out without the prospect of actually benefiting from the fruits of the work - the income being intended to pay creditors - does not represent a stimulating framework for the debtor. However, the prospect of debt relief if the debtor has covered certain shares of the total value of the claims within certain terms, should motivate generating income at an accelerated pace. In other words, the law protects the honest debtor who makes efforts to quickly cover the debts to the creditors.

The principle of maximising the debtor's wealth. In art. 2 paragraph 4 the legislator establishes as a benchmark the maximisation, through a collective procedure, of the degree of recovery of claims and the degree of capitalisation of assets, when appropriate. This principle has general application in insolvency proceedings, there being the direct interest of both the debtor and the creditors in collecting an asset as substantial as possible in order to cover the liability. The collective nature of the procedure, which reveals a rigorous and coordinated collection by the administrator of the procedure/liquidator and a fair distribution of the sums of money obtained, is insisted upon. The maximisation of the debtor's wealth is achieved by suspending individual foreclosures. Any enforced execution generates expenses for both the debtor and the creditor, or in the insolvency procedure where all the assets that can be used are identified by the debtor and a single assessment of the assets is made, the administrative expenses will be much lower. Simple coordinated action on all of the debtor's assets will maximise the debtor's wealth.

The principle of fair treatment of creditors. Ensuring, within the collective procedure, a fair treatment of creditors and an equal treatment for creditors of the same rank, is the principle enunciated in art. 2 paragraph 5 of Law no. 151/2015. The effective implementation of this principle is ensured by legal texts that do not support interpretation. Art. 62 paragraph 4 establishes the order in which creditors will satisfy their claims, with special mentions in the case of secured creditors - art. 62 paragraph 1. Between creditors of the same rank, the distribution is done pro rata, that is, proportional to the percentage of the claim held in relation to the claims of the same rank. Ensuring the fair treatment of creditors is done by the administrator of the procedure.

The principle of recognition of creditors' rights. The principle of recognising the existing rights of creditors and respecting the order of priority of claims, based on a set of clearly determined and uniformly applicable rules, can be found in art. 2 para. 6 of the law. In our opinion, this principle could be included in the previously stated principle - the principle of fair treatment of creditors. The order of priority of the claims referred to and whose compliance requirement is raised at the level of principle can be found in the claim table drawn up by the administrator/liquidator of the procedure. Both the debtor and any creditor have the right to contest the entries entered in the preliminary table of claims, with the consequence of the control of legality by the court. The method of distributing

sums of money to creditors is established by clear legal rules and an erroneous interpretation of the provisions of art. 62 will be able to be corrected by the court regardless of whether the mentions regarding the distribution carried out will be contained in the quarterly report (art. 61) or the final report (art. 63).

The principle of speed of procedure. The legal consecration of this principle can be found in art. 2 para. 7 which ensures an efficient insolvency procedure, including through appropriate mechanisms for communicating and conducting the procedure within a reasonable time, objectively and impartially, with minimum costs for creditors, debtors, institutions, and public authorities, as well as for any other entities involved. Ensuring a reasonable term in which an insolvency procedure must be carried out efficiently is ensured by the legislator both by establishing shorter procedural terms than in common law, but also by the possibility of the creditor taking over an asset on account of the claim if time for two years it was not possible to capitalise it.[23].We believe that attributes such as objectivity and impartiality should characterise the activity of the administrator or the liquidator of the procedure, an activity that can be subject to the control of the courts. The expenses of the insolvency procedure represent a particularly important aspect in the context of analysing the efficiency of the insolvency procedure as they will be borne by the debtor already in a situation of financial difficulty, aspects established by art. 62 paragraph (1) and paragraph (4) point 1 of the law.

The principle of transparency and predictability of the procedure. The legislator ensures a high degree of transparency and predictability in the procedure, respecting fundamental human rights and protecting personal data through the principle enunciated in art. 2 paragraph 8 of Law no. 151/2015.

To achieve the purpose of the insolvency procedure, a fundamental condition is that all parties involved provide correct information, be informed in turn, collaborate, and cooperate. Even if, to ensure information, the law establishes that the documents of the procedure will be published in the Bulletin of Insolvency Procedures, we appreciate that the human factor has a decisive role.

Analysis of the Principles of the Insolvency Procedure from a Jurisprudential Perspective

If until 2014 some clear, fundamental principles were outlined in the insolvency matter, although they were not expressly mentioned in the law, ten years later we find that in the insolvency matter we have 22 principles expressly mentioned, 14 in the insolvency of professionals and 8 in the matter insolvency of natural persons.

Regarding the insolvency of professionals, in practice there is predominant use of a few particular principles, while the rest have an extremely limited area or are even non-existent in jurisprudence, found to be unmentioned in court decisions. Situations are extremely rare in which the need to disclose information of a competitive nature intervenes, to operate with qualified financial contracts, to

[23]art. 59 of Law no.151/2015 regulates special payment;

have an external financier appear in the insolvency procedure, to open the insolvency of a group of companies. Also, the incidence of restructuring or concordat procedures is extremely low.

Some principles are reflected almost identically in the legal text. Thus art.4 pt 13 Law 85/2014 – The principle of administration of insolvency prevention and insolvency procedures by insolvency practitioners and their conduct are under the control of the court, within the limits provided by this law, unequivocally summarised in art.7 and art.57 from law no. 85/2014. Article 7 stipulates that the bodies that apply insolvency prevention procedures are the courts through the judicial judge, the restructuring administrator and the bankruptcy administrator. Thesis 2 of art. 7 indicates that "the restructuring administrator and the concordat administrator must have the capacity of an insolvency practitioner". Art 57 shows that "interested insolvency practitioners will submit to the file an offer to take over the position of judicial administrator, to which they will attach proof of the quality of insolvency practitioner..." In this context, the reaffirmation at the level of principle that only insolvency practitioners can administer insolvency prevention procedures but also insolvency procedures seem unnecessary.

Other principles seem to aim at the same point. Thus, art. 4 point 1 enshrines the principle of maximising the degree of capitalisation of the asset and art. 4 pt. 11 enshrines the principle of timely and efficient capitalisation of assets. In our opinion, the maximisation of the asset's valorisation fence even requires an efficient and timely valorisation of the assets, not being necessary to consecrate two distinct principles.

Thus, from the perspective of their applicability, we give maximum interest to the principle of maximising the degree of capitalisation of the asset, the principle of granting the chance of financial recovery of the debt, the principle of speed, the principle of transparency and predictability of the procedure, the principle of recognising the existing rights of creditors and respecting the order of priority of claims, having as a basis a set of clearly determined and uniformly applicable rules which should be supplemented with the principle of ensuring equal treatment of creditors of the same rank.

If the principles enunciated in the matter of insolvency of professionals support a discussion from a jurisprudential perspective, in the matter of insolvency of natural persons it is of no interest. Insolvency of natural persons, despite the multiple benefits established for over-indebted citizens, is not a procedure accessed in Romania. In the paper presented at the 2021 ATINER Conference, we presented the minimal number of accesses to the procedure, although the law entered into force in 2018, and currently the situation has not changed. The extremely small number of people who have benefited from the natural person's insolvency procedure makes it impossible to analyse the jurisprudential application of the principles expressly stated in the law.

Conclusions

The Romanian legislator, in consecrating the principles applicable in insolvency, had as a source of inspiration the principles of the World Bank, the European principles of insolvency as well as the UNCITRAL Guide in matters of insolvency but also the EU Directive 2019/1023 on preventive restructuring frameworks transposed into national legislation by Law no. 216/2022 which amended and supplemented law no. 85/2014.

However, the principles must remain fundamental prescriptions that channel the creation of law as well as its application. They draw guidelines, exercise constructive action, and must guide the activity of the judge and also of the insolvency practitioner. They must provide support when the legal situation is unclear or the law is silent, the principles having the role of supporting judicial reasoning in resolving the legal issue.

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Crowdfunding Platforms, an Innovative Way of Providing Crowdfunding Services in the Age of Artificial Intelligence. EU Legislative Implications. Applicability in Romania

*By Elise Nicoleta Vâlcu**

Equity crowdfunding is a technologically adapted alternative form of financing to bank financing, and also a type of intermediation in which a crowdfunding service provider, without taking risks itself, manages a digital platform, open to the general public, to connect or facilitate the connection of potential investors or lenders with the business community seeking finance. Through crowdfunding, investors can finance projects published on the crowdfunding platform either by providing loans (crowdlending) or by purchasing securities/instruments admitted for crowdfunding purposes issued by project developers (crowd-equity). At European Union level, the provision of equity crowdfunding services is stated by Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European providers of equity crowdfunding services to business and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937 ("Regulation (EU) 1503/2020") and by delegated regulations of the European Commission which approved the regulatory technical standards drawn up by the European Securities and Markets Authority (ESMA) and the European Banking Authority (EBA). In Romania, in order to properly implement the EU legislative framework, Law no 244 of 20 April 2022 on measures implementing the Regulation (EU) 1503/2020. The present research aims at highlighting a number of issues for reflection, among which we mention by way of example: (i) the interpretation of the term "commercial activity or activities" in the context of the Regulation (EU) 1503/2020; (ii) the typologies of crowdfunding providers, their role in the crowdfunding mechanism, but also to what extent are they entitled to accept only sophisticated investors? doctrinal implications; (iii) minimum prudential requirements laid down by the EU legislator in Regulation (EU) 1503/2020 to the effect that a crowdfunding provider is required to have prudential safeguards in place at all times; (iv) to what extent can a project owner market their crowdfunding projects? (v) the particular nature of the activity of providers of equity financing services authorised in a Member State of the European Union who may provide equity financing services in a Member State other than the Member State whose competent authority granted the authorisation, on the basis of a simplified procedure (license passporting) involving notification to the competent authority of the Member State which granted the authorisation of the intention to provide equity financing services in other Member States of the European Union, etc. In summary of the above, we believe that, as an expression of the age of artificial intelligence, the crowdfunding market, both at EU level and in the particular

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case of Romania, shows an upward trend, characterised by the fact that both investors and project developers are increasingly interested in crowdfunding services and in the way crowdfunding platforms operate.

Keywords: *Suppliers; Crowdfunding services; Online platforms; Digitisation*

Introduction

The era of digitisation brings to the level of the single market of the European Union a new concept, a new reality, namely crowdfunding which represents a viable way of ensuring access to financing for SMEs and startups through online platforms.

What does the provision of crowdfunding services involve? This type of financing involves the participation of three types of actors: the project developer who proposes the project for financing, the investors who finance the proposed project and a crowdfunding service provider with an intermediary role, which connects project developers and investors within a publicly accessible online platform, including systems where user registration is required.

It is necessary to specify that both credit-based and investment-based crowdfunding (transferable securities) are considered, because these types of financing can be conceived as comparable financing alternatives.

Lending-based crowdfunding involves facilitating the granting of loans with an unconditional obligation to repay the investor an agreed amount, the role of lending-based crowdfunding platforms being only to facilitate the conclusion of loan agreements between investors and project developers, without the provider of crowdfunding services to act as a lender to the project developer at any time.

Therefore, with the development of the capital market[1] and online investments[2], crowdfunding as a business model required regulation at the level of the European Union. Specifically, on October 7, 2020, the Union legislator adopted Regulation (EU) 2020/1503[3] of the European Parliament and of the Council of

[1]See Carreau & Juillard (2007) at 461-482.

[2]See for developments in this regard, Popa Tache (2020) at 456-465; Alschner & Tuerk at 11.

[3]Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European providers of crowdfunding services for business and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937 (Text with relevance for the EEA), published in OJ L 347, 20.10.2020, p. 1–49. Regulation (EU) 2020/1503 is supplemented by the following provisions: (a) Commission Delegated Regulation (EU) 2022/2111 of 13 July 2022 supplementing Regulation (EU) 2020/1503 of the European Parliament and of the Council with regard to standards technical regulations specifying the requirements regarding conflicts of interest for crowdfunding service providers; (b) Delegated Regulation (EU) 2022/2112, supplementing Regulation (EU) 2020/1503 of the European Parliament and of the Council with regard to regulatory technical standards that specify the requirements and modalities for the application for authorisation as a service provider crowdfunding etc. (c) Delegated Regulation (EU) 2024/358 of the Commission of September 29, 2023 supplementing Regulation (EU) 2020/1503 of the European Parliament and of the Council with regard to regulatory technical standards specifying the requirements regarding the assessment of the creditworthiness of financing projects crowdfunding, pricing crowdfunding offers and risk management policies and procedures, OJ L 2024/358, 22.01.2024, https://eur-lex.europa.eu/eli/reg_del/2024/358/oj

October 7, 2020 on European providers of crowdfunding services for businesses, a legislative framework that establishes uniform requirements for the provision of services of crowdfunding at the EU level, with reference to the organisation, authorisation and supervision of crowdfunding service providers, the operation of crowdfunding platforms, as well as transparency and advertising communications in relation to the provision of crowdfunding services in the Union.

Synoptic Approach to the EU Regulation of Crowdfunding as a Business Model

Specific Concepts. Legislative Aspects

Crowdfunding can be seen as a business model through which the crowdfunding service provider provides financing services on a specialised online platform and which, in the light of art. 2 para. (1) letter a of the Union harmonisation framework, assumes "connecting investors interested in providing business financing with project developers through the use of a crowdfunding platform, a service consisting of any of the following activities: (a) facilitating the granting of loans[4], (b) placing, without firm commitment, of securities and instruments admitted for the purpose of participatory financing issued by project developers, etc.

Providers of crowdfunding services authorised in a member state of the European Union can provide crowdfunding services in a member state different from the member state whose competent authority granted the authorisation, based on a simplified procedure (*license passporting*) that involves informing the authority in the member state that granted the authorisation regarding the intention to provide crowdfunding services in other member states..

It is imperative to recall that in the sense of art. 4 para. (1) point 44 of Directive (EU) 2014/65[5] on the markets of financial instruments, by "*securities*" is meant "the classes of securities that can be negotiated on the capital market, with the exception of payment instruments, as for example: (a) shares held in companies and other securities equivalent to shares held in companies, partnerships or other entities, as well as depositary receipts for shares; (b) bonds and other securitised debt securities, including depository receipts for such securities;(c) any other securities giving the right to buy or sell such securities or leading to a cash settlement, established in relation to securities, currencies, interest or return rates, commodities or other indices or units of measurement".

With reference to the concept of "*instruments admitted for the purpose of participatory financing*" we find specific references in the very text of the standardisation norm, where in art. 2 para. (1) letter (n) the Union legislator

[4]"loan" means a contract whereby an investor makes available to a project developer an agreed sum of money by an agreed term and whereby the project developer unconditionally undertakes to repay the investor that sum and accrued interest in accordance with payment schedule in instalments.

[5]Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets of financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast), OJ L 173, 12.06.2014, p.349-496, consolidated version on 28.03.2024

clarifies it in the sense in which it means "the social parts of a limited liability company that are not subject to any restrictions likely to effectively prevent their transfer, including restrictions on how these social parts are offered or presented to the public".

The concept of "client" in the union vision actually implies two meanings, namely "investor" and "project developer", in other words the two actors "face to face" "to do business" through the online platform, facilitated by the administrator or operator of financing services (provider of participatory financing services) [6].

Whenever the crowdfunding service is about facilitating the granting of loans, the funding platform brings face to face in the digital environment the *investor* who can be a natural or legal person who grants loans and the *project developer* who intends to obtain funding through the crowdfunding platform. In the event that a crowdfunding service regarding the placement is offered through a platform, without a firm investment commitment, the *investor* will become a "player on the platform" in order to acquire securities or instruments admitted for the purpose of crowdfunding.

Categories of Obligations Incumbent on Providers of Participatory Financing Services

As stipulated in art. 3 paragraph (1) of Regulation (EU) 2020/1503, crowdfunding services can only be provided by a legal entity that is established in the European Union and has been authorised as a crowdfunding service provider by an authority competent authority of the member state in which the request for authorisation was registered in order to acquire this qualification.

References regarding the mandatory conditions to acquire the quality of crowdfunding service provider are not clearly identified by the Union legislator, however, they can be derived from the provisions of Article 12 of the Union standardisation norm, in the sense that, in order to be authorised in in this capacity, the following elements are required:

(a) the name of the potential service provider (including the legal name and any other commercial name to be used), the address of the internet page operated by that provider and its physical address;
(b) the legal form of organisation;
(c) the constitutive act of the potential supplier;
(d) identification of the types of services to be provided on the crowdfunding platform, including where and how the crowdfunding offers will be marketed;
(e) a description of the prudential guarantees of the potential crowdfunding service provider in accordance with art. 11, including proof that it meets these guarantees;
(f) the identity of the natural persons responsible for the administration of the potential provider of crowdfunding services, including proof that they

[6] Lazăr (2023).

enjoy a good reputation (for example, about the absence of a criminal record regarding cases of violation of the provisions of domestic law in commercial matters, of insolvency, in the field of financial services, in the field of combating money laundering, in the field of fraud) and possess sufficient knowledge, skills and experience to ensure the administration of the potential crowdfunding service provider;

(g) a description of the procedures developed by the potential crowdfunding service provider to:
   i. verify the correctness and clarity of the information contained in the key investment information sheet;
   ii. control and protection of data processing systems[7];
   iii. to handle customer complaints.

The Obligation to Report Annually the List of Projects Financed through its Financing Platform[8]

A first obligation incumbent on the supplier, as stipulated by the Union legislator in the framework of art. 16 of Regulation (EU) 2020/1503, consists in reporting to the competent authorising authority, the projects financed through the crowdfunding platform, specifying for each: the project developer and the amount collected, but also aggregated information regarding investors and the amounts invested broken down into depending on the tax domicile of the investors, distinguishing between sophisticated and unsophisticated investors.

Obligation to Inform Customers

As the Union legislator states in art. 19-21 and art. 23 of Regulation (EU) 2020/ 1503, crowdfunding service providers have the obligation to convey to customers, in a fair and unequivocal manner, in a place visible, including on each mobile application and website on which the offer is made, all information, including advertising communications, references regarding crowdfunding services or investments (for example, the provider of crowdfunding services makes available to potential investors a sheet with essential information regarding the investment, developed by the project developer for each crowdfunding offer), financial risks, costs but also the commissions related to them. The information may also refer to the fact that their crowdfunding services are not covered by the deposit guarantee scheme established in accordance with Directive 2014/49/EU or that the securities or instruments admitted for the purpose of crowdfunding purchased through their platform of crowdfunding are not covered by the investor compensation system established in accordance with Directive 97/9/EC.

In the event that crowdfunding service providers apply credit rating to projects or suggest pricing for offers on their crowdfunding platform, they shall provide a description of the method used to calculate such credit ratings or pricing.

[7]Fabiano (2017).

[8]Based on these reports, ESMA develops and publishes annual aggregated statistics on the crowdfunding market in the European Union, on its website: https://www.esma.europa.eu

Last but not least, whenever the crowdfunding services consist of facilitating the granting of loans, the service providers have the obligation to publish on their financing platforms (on the provider's web page) in a visible place, annually, the rates of default related to crowdfunding projects.

Obligation to keep Records of Services and Transactions carried out on Online Financing Platforms

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In the light of the provisions of the standardisation rule, crowdfunding service providers are obliged to keep all records related to their services and transactions on a durable medium for a period of at least five years, as well as the contracts concluded by them with their clients. It should be emphasised that, in order to ensure the transparency of financing services on specialised online platforms, providers have the obligation to submit due diligence so that their customers have permanent access to the records of the services.

Obligations Regarding Advertising Communications

As regulated in art. 27 of the Union regulation, financing service providers have the obligation to transmit advertising communications regarding their services, including those outsourced to third parties, respecting the following requirements: (a) One or more of the official languages of the Member State in which the advertising communications are broadcast or a language accepted by the competent authorities of that Member State is used. (b) The information must be correct, clear and consistent with the information contained in the key investment information sheet.[9]

Peculiarities of Crowdfunding Implementation in Romania

Authorisation in Romania, as a Provider of Participatory Financing Services

As can be seen from the content of this study, crowdfunding is a particular way of multi-financing available to startups and SMEs for various projects and business, carried out through digital platforms[10].

Circumscribed by the provisions inserted in art. 3 paragraph 1 in conjunction with art. 12 of Regulation (EU) 2020/1503, the implementing text of Law no. 244/2022[11] specifically identifies the essential elements that a company must take into account for authorisation in Romania as a provider of participatory financing services, namely -

[9]In Romania, the responsibility to supervise compliance and to ensure compliance by crowdfunding service providers with legal acts and administrative acts applicable to advertising communications, rests with F.S.A.

[10] Worldwide, the most famous crowdfunding sites are Kickstarter and Indiegogo, from the USA. The first one does not allow financing projects by selling social shares, but it is very popular among startups who want to get funds by selling their products to supporters. Indiegogo was launched in 2008 and is headquartered in San Francisco, with offices in Los Angeles and New York.

[11]Law no. 244 of 20 July 2022.

(a) the notification of the Financial Supervisory Authority of Romania in order to authorise the operation according to the provisions of art. 12 of Regulation (EU) 2020/1503, with the compliant application of the regulatory technical standards drawn up by ESMA and EBA and approved by the delegated regulations of the European Union Commission, and also the submission of supporting documents in this regard. These documents refer to the terms and conditions of use of the platform, to the draft contracts that will be concluded between investors and project developers through the crowdfunding platform, to the activity program or to the business continuity plan, to the description of operational risks and prudential guarantees, to the description of the governance and internal control mechanisms, to the procedures used for the control and protection of data processing systems, the description of the internal rules regarding the conflict of interests, etc. With reference to the provisions of art. 12 paragraph 2 letter (b) of Regulation (EU) 2020/1503, namely the legal form of the potential supplier, they are supplemented with the provisions of art. 6 paragraph 2 of Law no. 244 of 2022, in the sense that in Romania, the crowdfunding service provider is established as a Romanian legal entity, according to the provisions of Law no. 31/1990 republished;

(b) ensuring the fulfilment of the minimum prudential requirements provided for by Regulation (EU) 2020/1503, in the sense that a crowdfunding service provider must permanently have prudential guarantees[12] at least equal to the greater of the following: (a) the amount of EUR 25,000; (b) one quarter of the previous year's fixed overheads, revised annually;

(c) performing an IT audit regarding the IT systems used, regarding compliance with the Norm issued by the Financial Supervision Authority under no. 4 of February 28, 2018 regarding the management of operational risks generated by the IT systems used by entities authorised/approved/registered, regulated and/or supervised by the F.S.A,.[13] and

(d) whenever required, identifying and contracting the services of external providers which, as the case may be, could be: payment service providers, cloud service providers, IT services or know-your-customer (KYC) services.;

Regarding the natural persons involved in the administration of the potential crowdfunding service provider, the text of art. 12 paragraph (3) letter b of the union standardisation norm is supplemented with the provisions of art. 6 paragraph 3 of the implementing law, so the natural persons involved in the administration of the potential crowdfunding service provider must hold, at a collective level, sufficient knowledge, skills and experience to ensure the administration of the potential crowdfunding service provider. It is necessary to mention that, this condition is to be considered fulfilled if at least half of the members of the board of directors/ supervisory board or other bodies or functions assimilated to them (i) are graduates, with a bachelor's or master's degree, of a higher education institutions in the financial-banking, economic, legal, accounting, auditing, public administration, information technology fields, or (ii) have professional experience in the financial field in management positions of at least 3 years.

[12] Prudential guarantees can be represented by own funds or insurance policies or a combination thereof.

[13]On the website of the Romanian Financial Supervisory Authority one published the list of external IT auditors registered with the Financial Supervisory Authority who can be considered for the preparation of an IT audit report

Particularity of the Attributions of the Financial Supervisory Authority (FSA) in Romania, in the matter of Crowdfunding

It should be emphasised that, pursuant to art. 6 of Law no. 244/2022, in order to provide crowdfunding services on the territory of Romania, crowdfunding platforms must obtain an authorisation from the Financial Supervisory Authority - FSA whose competence, in the light of art. 2 of Law no. 244/2022 consists in authorising, supervising and controlling financing service providers[14]. F.S.A. collaborates with the National Bank of Romania, hereinafter referred to as B.N.R., according to the provisions of art. 33 of Regulation (EU) 2020/1503, if authorisation requests come from entities that already hold a valid authorisation issued by B.N.R. as a credit institution, electronic money issuing institution or payment institution or have been registered as specialised account information service providers, legal entities or non-banking financial institution[15].

References regarding the procedural mechanism that must be followed by the applicant in order to acquire the quality of provider of participatory financing services can be found in the content of art. 7-10 of Law no. 244/2022. Specifically, any applicant for authorisation to provide crowdfunding services submits an application addressed to F.S.A., on the basis of which they will be entered in the F.S.A. Register. In accordance with art.8 and art.9 paragraph (1) of the law on application of the Union regulation, the Romanian authority has the power to withdraw the authorisation granted to the crowdfunding service provider, notifying ESMA in this regard, in the situations provided for in art. 17 paragraph (1) of Regulation (EU) 2020/1503:

- did not use the authorisation within 18 months from the date it was granted;
- he expressly renounced the authorisation that had been granted to him;
- has not provided crowdfunding services for nine consecutive months and at the same time is no longer involved in the administration of existing contracts that were originally concluded by connecting investors interested in providing financing through the use of its crowdfunding platform;
- obtained the authorisation through irregular means, including false statements in his application for authorisation;
- no longer fulfils the conditions under which the authorisation was granted;

As stipulated in art. 9 paragraph 2 of Law no. 244/2020, in application of the provisions of art. 17 paragraph 2 of Regulation (EU) 2020/1.503, A.S.F. has the obligation to notify both ESMA and the competent authorities of other member

[14]The provisions regarding the organisation and operation of ASF Romania are stipulated in Law no. 113 of April 13, 2013.

[15]In accordance with the provisions of O.U.G. no. 99/2006, approved with amendments and additions by Law no. 227/2007 with subsequent amendments and additions, of Law no. 209/2019 regarding payment services and for the modification of some normative acts, and of Law no. 210/2019 regarding the activity of issuing electronic money or of Law no. 93/2009 with subsequent amendments and additions.

states if the crowdfunding service provider has notified A.S.F. regarding the intention to provide cross-border crowdfunding services in the respective member states according to art. 18 of Regulation (EU) 2020/1503.

The Sanctioning Regime for Violating the Provisions on the Operation of Crowdfunding Platforms

Regulation (EU) 2020/1503 states that, until November 10, 2021, EU member states, including Romania, must regulate, through implementing rules, fines for crowdfunding platforms and for their heads, as natural persons, in case of irregularities, these having a level of at least 500,000 euros or up to 5% of the turnover.

With reference to this issue, we mention that in Romania, the contravention fines regime was regulated by Law no. 244/2022, their amount being between 10,000 RON and 2,433,700 RON or up to 5% of the total annual turnover of the crowdfunding platform, in case of irregularities. Also, administrators of multi-financing platforms in Romania will risk fines between 5,000 RON and 2,433,700[16] RON for various irregularities. Depending on the seriousness of the act, the platforms can also bear complementary sanctions, such as the withdrawal of the authorisation to operate on the market.

What deviations are considered by the legislator? Mainly, as regards crowdfunding platforms, the irregularities referred to in Law no. 224/2922 are contained in Regulation (EU) 2020/1503 and refer to situations where a crowdfunding service provider addressed to potential investors from Romania:

- in applying the provisions of art. 23 para. (2) of Regulation (EU) 2020/ 1.503, do not write in Romanian the sheet with essential information regarding the investment.
- does not fulfil its obligation to act "honestly, fairly and professionally in the interests of his clients".
- an advertising communication disproportionately targets individual crowdfunding projects or offers (for example, providing unclear information that may mislead investors regarding the projects subject to the crowdfunding campaign).
- in the advertising communications in Romania, formulate expressions like "the biggest", "the best provider of crowdfunding services", expressions prohibited in accordance with the provisions of the applicable law.
- does not ensure that all advertising communications, relating to their services, are clearly identifiable as such.
- refuses to cooperate or comply in the event of an investigation, control or request from the authorities.
- proposes to individual investors crowdfunding projects that do not correspond to the risk indicators determined by the investor.

[16]This limit of 2.43 million lei, proposed by the Romanian authorities, represents 500,000 euros at the rate of November 10, 2020, according to Regulation (EU) 2020/1503.

- violates its obligations regarding prudential safeguards. In this regard, we remind you that in accordance with the provisions of Regulation (EU) 2020/1503, crowdfunding service providers must permanently have prudential guarantees of at least 25,000 euros. Likewise, if the platform also facilitates the granting of loans, it must also have prudential guarantees equivalent to 25% of the previous year's fixed general expenses, reviewed annually, which should include the cost of administering the loans for a period of 3 months.

It is necessary to remember in the light of the provisions of application, on the territory of Romania, the platforms will not be allowed to make estimates regarding their future achievements or to publish the statements of previous, present or potential investors in this sense. In addition, they have an obligation to warn potential investors, in all advertising communications being introduced the saying: "Read the key investment information sheets at project or platform level before investing in the platform".

Conclusions

In the synthesis of the above, we appreciate that the union standardisation norm was adopted with the aim of promoting cross-border crowdfunding services, in order to facilitate the exercise of the freedom to provide and benefit from these services on the internal market of the European Union.

We also believe that the view of the Union legislator regarding the issue analysed in this study is circumscribed by the Union policy of maintaining a standard of investor protection, at the same time aiming to reduce the risks associated with crowdfunding but also to ensure a fair treatment for all customer

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The Consequences of bullying on the Child and on the Rights of Personality

By Andreea Drăghici•

The bullying of children, a form of repeated and intentional aggression, has significant consequences on the rights of personality. Through exposure to physical, verbal, or social harassment, victims become vulnerable with negative effects on their mental and emotional health. By attacking their emotional and psychological integrity, children may develop anxiety, depression, and even post-traumatic stress disorders. Bullying violates this fundamental right to dignity through the humiliation and contempt towards victims. The constant experience of harassment and aggression can diminish the sense of self-respect and lead to a feeling of dehumanisation and degradation. Children who are victims of bullying may feel that their dignity is being violated and that they are not being given the respect and recognition they deserve. Furthermore, bullying can have consequences on the right to one's image. These effects can be lasting and may influence how victims perceive themselves in the future. Children may develop a distorted image of themselves, viewing themselves negatively or doubting their own qualities and abilities. In conclusion, bullying not only affects the rights of personality but can also have profound consequences on their long-term emotional and social development. It is essential to pay attention to these aspects and take measures to protect children's rights to a safe, respectful and dignified childhood.

Keywords: *Aggression; Bullying; Children; The rights of personality; Victim.*

Introduction

Once you enter the "labyrinth" of the bullying phenomenon, you become aware of its scale, evolution, complexity and branching or "decomposition" into multiple psychological, sociological, educational, legal or ethical dimensions, such a sensitive exploration evoking the need for depth in analysis and interpretation, through interdisciplinary methods.

The present research aims to analyse the phenomenon of bullying from the perspective of the act and the educational environment, although the idea of violence entering the educational process seems to be a real dichotomy. Viewed as a "spiritual interweaving" between the student's desire for knowledge and the teacher's devotion to perfecting knowledge, education should be reflected in Aristotle's statement, in the sense that "*it makes man love what is worthy of being loved and hate what must be hated*". It is said that it is not enough for students to work hard, but they must also learn the Good, incompatible, otherwise, with

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aggression or harassment of any kind. Or, this ever-increasing intertwining of violence, in all its forms, with the act or educational environment, only distorts the aspirational ideal of education and of the propagated wisdom, "warping" the greatness and sacredness of our science and culture. The deep awareness of the dimension of this phenomenon and of the psychological repercussions, especially on the rights that are in intimate spiritual connection with the human being and that form the "inner universe" of children, respectively their conscience, dignity, honour, image or faith, is reflected in the identification of an ethical and moral "route"" in the evolution of humanity, today's children being the adults of tomorrow.

Moreover, awareness represents the first level of addressing violence and provides the trigger point for preventive and combating actions in the light of the values and coordinates of human existence such as good, love and solidarity.

The Phenomenon of Bullying: Awareness, Legal Coordinates, Trends and Challenges with Global Relevance

The concept of *bullying* was introduced in the literature in 1978, by the Norwegian psychologist Dan Olweus, following some studies on the violence manifested between students[1]. The word bullying does not enjoy an accurate translation into Romanian, but it is associated with the terms of intimidation, terrorizing, brutalisation, labeling, mockery, spreading rumors or even physical violence. Being an "umbrella" concept, which covers a whole range of manifestations or acts of violence, physical or psychological harassment, it is often used in general, especially in the educational space, without a deep awareness of the meaning or sanctions that can arise from such behaviours, but especially of the implications and long-term effects.

The phenomenon of bullying was recognised in the Romanian society quite late, only in 2019, at which point the Romanian legislator offered a complex definition based on *Law no. 221 of 18 November 2019 for amending and supplementing the National Education Law no. 1/2011.* Consequently, the then national education law, now repealed, was resized by absorbing the regulations on bullying and establishing a legal framework for such cases, this phenomenon being outlined and defined on the basis of the following coordinates:

> "*psychological violence, also referred to as bullying, is the action or series of physical, verbal, relational and/or cyber actions, in a social context difficult to avoid, committed with intent, involving an imbalance of power, have as consequence the attainment of dignity or the creation of an atmosphere of intimidation, hostile, degrading, humiliating or offensive, directed against a person or group of persons and targeting aspects of discrimination and social exclusion, which may be related to belonging to a particular race, nationality, ethnicity, religion, social category or to a disadvantaged category, or to sexual orientation, personal characteristics, action or series of actions, behaviours that take place in educational establishments and in all spaces intended for vocational education and training".*

[1]Cocorada (2008) at 7-28.

It should be noted that prior to Law no. 221/2019, the only document at national level with relevance on the phenomenon of bullying was the "*National strategy for child and adolescent mental health*"[2], the legislative vacuum thus not allowing criminal prosecution bodies or courts to apply sanctions that were circumscribed to psychological violence, under a special incriminating rule.

Currently, the concept of bullying has been taken up by the new education law, respectively *Law no. 198 of 4 July 2023 on pre-university education*[3] the definition developed by Law no. 221/2019 amending the previous education law, which regulated both pre-university education and university education. Moreover, the new education law succeeds develop measures to regulate the phenomenon of bullying, requiring the development of procedures and plans of measures to prevent, combat and manage the consumption of a case of bullying in school. As a consequence, in September 2023 it was elaborated the *National School Safety Action Framework Plan*,[4] as a result of the consultations between the technical teams of the signatory institutions with responsibilities in the field, carried out between 30 August - 05 September 2023, the plan having as a priority the prevention of bullying cases, as well as the reduction of the risk of exposing students to crimes.

At the same time, at the end of 2023, the Ministry of Education adopted the *'Procedure for the management of cases of violence against ante pre-schoolers/ pre-schoolers/ pupils and the staff of the educational establishment, as well as other related situations, in the school environment and the suspicion of violence against children outside the school environment*', approved by the Order of the Ministry of Education no. 6.235/2023,[5] which regulates the working modalities, the applicable rules and the responsibilities of persons involved in the interinstitutional and multidisciplinary management of cases of violence in the school environment.

Moreover, on 8 April 2024 the deadline for public consultation of the project on *National plan to combat school violence,* whose directions of action are: prevention of violence, promotion of well-being and cohesion of the school community, reduction of cases of violence in the school environment, management of cases of violence in the school environment and efficient management of resources in order to support victims, rehabilitation of perpetrators of violence and return to the condition of a safe environment in the school.

The purpose of the bullying regulations is not one of denying human contradictoriality, but of mitigating and shaping the conflicting human nature through the very education act, an act in which there should be no "shadow" of violence, since aggression cannot reach the "high notes" of education. Moreover, it is the educational climate that must ensure refuge, safe space for socialisation and unconditional support in the protection of children's rights, in the specialised literature[6] underlining the idea that the effects of acts of aggression such as

[2]Published in the Official Gazette no. 997 of 12 December 2016.
[3]Published in the Official Gazette no. 613 of 05 July 2023.
[4]https://www.edu.ro/Planul-National-Cadru-de-Actiune-privind-siguranta-scolara
[5]https://www.edu.ro/management_cazuri_violenta
[6]Samara, Burbidge, El Asam, Foody, Smith & Morsi (2017).

bullying and cyberbullying become visible by even distorting the educational climate. Let's not make the education system vulnerable.

Do we need a re-conceptualisation of school harassment from a human rights perspective to be able to address these challenges? Do we need an integrative perspective on bullying? First of all, we consider it appropriate to regulate bullying through a normative act by itself. *De lege ferenda*, it would impose an anti-bullying law based on its own principles of operation, its own institutions and sanctions, being unified into a *common corpus* all legal provisions regarding bullying materialised in the educational environment. However, the dissemination of these regulations in various normative or administrative acts, such as those mentioned above, only bypasses the requirements of clarity, and predictability associated with a special law. The effectiveness of the applicability of these provisions is conditioned by a high degree of descriptivism of the conditions of existence and manifestation of the phenomenon of bullying type. In this sense, consuming an episode of bullying must be approached through a coherent, fluid normative path, in consideration of which is also found the philosophy of restorative justice that embraces a wide range of human attributes such as healing, empathy, forgiveness, compassion and reconciliation.

On the other hand, this vision and the need for a holistic approach, *in globo,* of the phenomenon of bullying, by reconfiguring and resizing it in the light of human rights, especially of the child, is also reflected in the concerns of the Union and international bodies, bullying becoming a generalised problem at global level, towards which we must have a constructive attitude and understand the need for a new legislative intervention[7]. We must strive for integrated child protection systems, and multidisciplinary responses are needed to contribute substantially to building more just societies, underpinned by intergenerational equity and solidarity for present and future generations.

At regional level, protecting all children from violence, including school violence and bullying, is one of the priorities of the current *Council of Europe Strategy for the Rights of the Child 2022-2027*, in the sense that the prevention of bullying begins with the education of children and their awareness of the harmful effects of bullying on others, but also through permanent cooperation at European level, in particular by promoting holistic, flexible and proactive educational policies. The various education programmes are based on the principles of the Charter on Education for Democratic Citizenship and Human Rights Education adopted by all the Member States of the Council of Europe. At the same time, the Directorate for Democratic Citizenship, which participates in the Council of Europe's efforts to combat bullying, has created a multitude of tools, including child-friendly materials and educational materials for education which professionals in education field use in schools, such as *Compasito*[8], the Manual on Human Rights Education for Children.

Also at the level of the European Union, which is home to 80 million children, there is an accelerated trend of placing children at the heart of protection systems, in view of the alarming statistics on child abuse, violence and neglect in

[7]Niță (2021).
[8]http://www.eycb.coe.int/compasito

Europe, which is why recently, more precisely on 23 April 2024, the European Commission adopted a *Recommendation on developing and strengthening integrated child protection systems in the best interests of the child*[9]. With this Recommendation, the EU aims to bring together all its actions to protect children from violence, supporting Member States in developing and strengthening their child protection systems in their best interests, among the objectives being to improve children's digital literacy, protect children's integrity and mental health, and prevent and combat (cyber) bullying. The EU thus encourages countries to develop national mental health strategies and use existing union instruments to strengthen child protection systems, including laws, policies and funding. The best interest of the child is an extremely complex notion, being the criterion that must govern any decision or action carried out by any authorised public or private person or institution that directly targets the child.[10]

The Recommendation shall be accompanied by a communication on "*Putting Children's Interests First: A Communication accompanying the Commission Recommendation on Integrated Child Protection Systems*" and it echoes the views of more than 1,000 children, collected through the new EU child participation platform, in the view that no policy on children should be designed without their voice. At the same time*, EU Strategy on the Rights of the Child* and *European Child Guarantee* represent major policy initiatives proposed by the European Commission to better protect all children, help them fulfil their rights and put them right at the heart of EU policy-making, both of which involve the voice of 10,000 children.[11] Child protection is also a key objective of the UN Convention and the 2030 Agenda for Sustainable Development, so that every child can live free from fear, neglect, abuse and exploitation. The staggering statistics and evidence of the wide range of child abuse, violence and neglect in the EU, including the record of the pandemic, the repercussions of the war of aggression against Ukraine and the rise of global armed conflicts, are, in fact, a call for further action.

In addition, according to EU regulations, children's rights are fundamental rights, with all EU Member States being parties to the UN Convention on the rights of the child. This determines an integrated approach to protecting children. The EU strategy thus includes a strong external dimension, with the EU stepping up its work in promoting children's rights globally, eradicating child labour and protecting all forms of violence, abuse and neglect, including in a humanitarian context.

Also worrying is the recent UNICEF Report[12] drawing attention to the challenges facing children living in European Union countries, including increasing poverty, deteriorating mental health, online sexual abuse and exposure to pollution, Bertrand Bainevel, UNICEF's representative to the EU institutions, said that "it is essential that the EU builds on its recent achievements in promoting

[9]https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/rights-child/combating-violence-against-children-and-ensuring-child-protection_en
[10]Drăghici (2013).
[11]https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/rights-child/eu-strategy-rights-child-and-european-child-guarantee_en
[12]https://www.unicef.org/eu/stories/state-children-european-union-2024.

child welfare, including the adoption of the EU Strategy on the rights of the child in 2022 and the European Child Guarantee", with an overwhelming 71% of children's concerns being harassment and bullying.[13]

The constancy of the phenomenon of violence in the educational environment has, of course, led the entire international community to become aware of the beginning of the degradation of the educational climate, triggering the formulation of specialised policies and tools.[14] Going beyond the Union borders and the outlined *acquis*, we must recall the United Nations Convention on the Rights of the Child, which is considered the general framework for protection against acts of violence, whereas injury, physical or mental abuse, abandonment or neglect, ill-treatment or exploitation, including sexual abuse, are covered. Thus, in the opinion of the Committee on the Rights of the Child, the comprehensive expression used in Article 19 of the Convention, namely "any forms of violence" leaves no room for interpretation, in the sense that it does not admit any form of legalised violence against children.

Nada Al-Nashif, United Nations Deputy High Commissioner for Human Rights, said bullying is a serious global problem, exacerbated by the use of new technologies and the digital environment, and is a complex topic at the intersection of human rights issues, digital issues and policy issues. Consequently, a holistic approach is needed, starting from the analysis of the root causes and continuing with the analysis both from the perspective of the child who is harassed and from the perspective of the child or adult who is bullying, the analysis, of course, revolving around the rights and best interests of the child.[15]

We could say that reaching the peak of global awareness of the phenomenon of bullying was achieved in 2019, during the 40th Session of the of UNESCO General Conference, held in Paris, when the date 02 November was proclaimed as the International Day Against Violence and Bullying at School, including cyberbullying. This universal concern about the mental health and well-being of students is on a continuous rise, especially in the wake of the COVID-19 pandemic and its devastating impact on students, with the international perspective being to ensure safe and supportive environments for students and teachers.[16]

Personality Rights: An Analysis "in the Light" of the Rights of the Child

"*When the lives and the rights of children are atstake, there must be no silent witnesses*" (Carol Bellamy).

In an ideal picture of human values protected by bullying regulations, we find that the most affected coordinates related to the essence and spirit or moral side of the human being are dignity and honour. Dignity is the core of personality

[13]https://www.eurochild.org/resource/our-rights-our-future-the-europe-we-want/.
[14]Voiculescu & Berna (2020).
[15]https://www.ungeneva.org/en/news-media/meeting-summary/2023/09/le-conseil-des-droits-de-lhomme-tient-une-reunion-debat-sur-le.
[16]https://www.unesco.org/.

formation, encompassing *"the fullness of human existence in every aspect of life*"[17], to which is added the divine component of freedom, man being in a permanent exploratory journey towards the attainment of happiness.

The right to dignity, a key concept at the center of interest of this research from the perspective of the phenomenon of bullying and the cognitive or affective vulnerabilities that it has the potential to explore in the "world" of children's rights, is part of the personality rights. Such sensitive aspects concerning the "inner universe" of the human being, reflected in human dignity or freedom of conscience, are superficially "touched" by domestic laws, in fact aligning with international law. The use of the concept of personality rights is common in most continental jurisdictions, including Switzerland, Austria and Japan. By opposition, the use of the concept is absent in the United States, where a broader approach includes the notion of *privacy* or that of defamation.[18]

The phrase "personality rights" derives its sap from the german term "Personlichkeitsrecht" - the right to privacy, "the notion and theory of personality rights being the work of doctrine and jurisprudence, being realised to be highlighted only at the end of the nineteenth century by the German school, although the first implications appear before the French courts".[19] In fact, the personality rights have been qualified in the literature as "*an umbrella of human rights to dignity*, private life and self-determination, as exemplified in European Convention on Human Rights and some aspects of German and French laws".[20]

The Romanian civil code regulates personality rights in the spirit of constitutional provisions. In fact, at national level, there has been an increase in interest on the intangible aspects of the corollary of human rights and freedoms, aspects related to the personality and thinking, moral integrity and living of the human being. In this sense, personality rights represent here an institution newly introduced by the Romanian civil code, through Chapter II – "Respect due to the human being and heir inherent rights", the notion of personality rights appearing in the marginal name of Article 58 of Book I - About persons[21].

Surely the personality rights represent a timid attempt, at the beginning of the road, to identify a kind of protection of something related to our inner, sacred "temple", something related to the quintessence of the human being, but it represents, at the same time, a step towards "compaction" of a road towards the consolidation of a new vision, a deeper vision of the human being. As the Romanian doctrine states,[22] the current Civil code "fits into the modern trend of civil law, which sees in the individual not only a legal abstraction – holder of civil rights and obligations, but also the man regarded as an object of legal protection".

[17]Zakarias & Benke (2013).
[18]Matefi (2020).
[19]Cristea (2013).
[20]Neethling (2005).
[21]See Art. 58 of the Romanian Civil Code: Personality rights – "(1) Everyone has the right to life, to health, to physical and mental integrity, to dignity, to his own image, to respect for private life, as well as other such rights recognised by law. (2). These rights shall not be transferable."
[22]Chelaru (2011).

The great Romanian philosopher[23] defined personality as that "structure in which elements borrowed primarily from the culture of the social environment are included, thus being a crystallisation of trends and traditions that arise from the biological life and extend to the social life [...] personality is the ego, laid in the structure of social life [...] the ego is the ferment of personality". In this sense, in an order of evolutionary occurrence, organic individuality precedes consciousness, consciousness precedes the ego, and the ego precedes personality, all of which interconnect in a process of unifying synthesis.

As stated in the doctrine[24], the personality to which these rights refer is not reduced to the technical notion of legal personality, in the sense of being a subject of law, but seeks to express more, namely the human person in its totality, in its biological, psychological and social reality.[25]

There is still neither in the Romanian doctrine nor in the foreign one a unitary agreement on the rights that belong to the category of personality rights. As a rule, the criteria used to classify non-property rights are also used to delimit personality rights. A relevant classification of personality rights could have as a criterion the triad of human structure: Man as a bio-psycho-social being, which divides personality rights into the following categories: personality rights that concern the human being as a bio-psychic entity (the right to life, the right to physical and mental integrity, the right to dispose of one's own body, the right to own voice); personality rights that concern man as a subject of emotional or affective states (the right to honour, the right to dignity, the right to reputation, the right to respect feelings of affection in the event of the death of a close person); rights related to the protection of man as a social being (in a subdivision, we speak of rights belonging to the natural person: the right to name, the right to domicile, the right to civil status, the right to respect for private life, the right to image, the rights of intellectual creation - non-property side and rights that define the legal person: the right to name, the right to registered office, the right to own company, emblem).[26] Making an inventory of all personality rights is impossible, as the list always remains open. In this regard, the enumeration of the Romanian legislator by Art. 58 Civil code of personality rights is not an exhaustive one, but as an example, an aspect supported even by the marginal name of the article "Personality rights", but also by the end of the article that uses the phrase "and other such rights recognised by law".

In light of the provisions of the Romanian Civil code, the right to dignity belongs to the category of personality rights, being provided in the exemple enumeration of Art. 58 suggestively called "Personality rights":

1. *Everyone has the right to life, to health, to physical and mental integrity, to dignity, to their own image, to respect for private life, as well as other such rights recognised by law.*
2. *These rights shall not be transferable*

[23]Speranția (1932).
[24]Ungureanu & Munteanu (2013).
[25]Cercel & Olteanu (2009).
[26]Duminică & Drăghici (2022).

Although it has gone through multiple reflections of the labyrinth of specialised theories, dignity, as personality right, still remains difficult to define, since it concerns generic notions impossible to clarify. Precisely from this confusing perspective, the legislator of the Romanian Civil code is limited only to mentioning the right to dignity, trying to shape its content by referring to two other notions: honour and reputation.

According to Art. 72 (1) of the Civil code in force "*Everyone has the right to respect for their dignity*" and according to par. (2) "*Any damage to the honour and reputation of a person without their consent or without respecting the limits provided in Art. 75*", norms that represent the common law in this matter. Analysing in cascade the defining elements of dignity, we find that the doctrine defines, on the one hand, honour, as "*that complex feeling, determined by the perception that each man has of their dignity, but also about the way others perceive it in this aspect*", and on the other hand, reputation, as "*the social expression of the same whole, acquired through the way the person is perceived in private or social life, as a result of their behaviour. Any encroachment on the right to dignity causes the victim moral (mental) suffering and exposes them to the risk of exclusion from the social, professional and family sphere*".[27]

From the perspective of international law, we refer to the Universal Declaration of Human Rights, which provides in Art. 1 that: "*All human beings are born free and equal in dignity and right."* and to the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20 November 1989, which enshrines the dignity of the child[28]. Under the "umbrella" of international conventions, a special place is occupied by the Oviedo Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, but also by the Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings[29].

Also, human dignity occupies a paramount place in the Union Law, Art. 1 of the Charter of Fundamental Rights of the European Union establishing that "*Human dignity is inviolable. It must be respected and protected*". As regards the European Convention on Human Rights, it does not expressly regulate the dignity of the human being, but it follows from the case-law of the European Court that "*it has the value of a material principle of interpretation that was invoked both for the assertion of individual rights and for limiting the freedom of the individual according to the values generally recognised at the level of society*".[30] It is

[27]Bratiloveanu (2019).
[28]Ratified by Romania by Law no. 18/1990, published in the Official Gazzette no. 314 of 13 June 2001.
[29]Ratified by Romania by Law no. 17/2001, published in the Official Gazzette no. 103 of 28 February 2001.
[30]Achimescu (2016).

therefore considered that the concept of human dignity can play a dual role of affirming but also of excluding or limiting the guarantees offered by the Convention.

Children's rights are human rights specifically tailored to children because they take into account their frailty, peculiarities and needs appropriate to their age. The child is no longer regarded as an "extension of their parents", but as a distinct person, the vision of them evolving from the Aristotelian conception according to which "the child is an unfinished being", to the recognition of them as a being with constantly evolving capacities and with the prerogative to actively participate in the legal and social life, benefiting from all the rights inherent in any human being.[31]

Exempli gratia, the right to image, a right highly targeted by the phenomenon of bullying, is on the agenda of the legislator in France, recently being approved Law no. 120/2024. The law marks a significant step in the protection of children's image rights in France, in a context in which the excessive dissemination of children's images on social networks poses significant risks to their private lives. Thus, Law no. 120/2024 introduces an important amendment to Article 371-1 of the French Civil Code, highlighting the need to preserve the child's personal sphere and adding a layer of legal protection against any invasion of their privacy. The legislative amendment broadens the scope of protection of the child's privacy, integrating this dimension into the obligations of parents, who are now obliged by law to respect and guarantee the privacy of their child, while continuing to exercise their parental authority in an educational manner.[32]

What highlights Law no. 120/2024, regulated in France, is the recognition of the vulnerability of children, advancing new coordinates of analysis and interpretation. In this respect, the idea is emphasised that children's rights require protection integrated into the whole of fundamental rights, but at the same time requires an adapted, "multifaceted", flexible protection, which takes into account their emotional, psychological and social development, which is contrasted with the degree of adaptation and reaction of adults. Anticipating and mitigating the risks associated with the excessive dissemination of children's images on social media, the law takes a proactive approach and demonstrates an awareness of the need to protect children in the ever-changing digital world where they may be more vulnerable. In French literature, it is explicitly recognised that the protection of the rights of the child is distinct and enhanced from that of adults, with the law establishing a clear contrast, due to the age, development and dependence of children, which justifies the stricter application of rules and penalties for non-compliance with their rights[33]. In fact, the Special Rapporteur on the right to privacy (Rapp. Defender of Rights, Privacy: A right for the child, 2022) alerted the authorities to the increasingly frequent violations of the privacy of minors on the internet, in particular the right to image, through the publication of photographs by minors, third parties and the parents themselves. Unfortunately, children are at

[31]Drăghici (2013).
[32]Respect du droit à l'image des enfants: ce que change la loi du 19 février 2024 - https://www.dalloz-actualite.fr/flash/respect-du-droit-l-image-des-enfants-ce-que-change-loi-2024-120-du-19-fevrier-2024.
[33]Zakaria (2024).

much greater risk of exposure to negative experiences, being vulnerable to admitting a violation of their privacy.

However, starting from the premise that certain legal concepts outlining fundamental rights and freedoms are often unclear and vague, such as, for example, the notion of thought or conscience in the context of the human right to freedom of thought, conscience and religion, it becomes all the more difficult to interpret and apply them in a possible merger with the matrix of the rights of the child and the principle of their best interests. Such concepts have no definitions drawn by the legislator, being developed only by jurisprudence, from an interdisciplinary perspective, through what we call the appeal to philosophy, spirituality, faith, an aspect that reveals the importance of an integrative perspective but also of the depth in the analysis and interpretation of fundamental human rights and freedoms in the light of the principles of the rights of the child. Moreover, we can say that even the interests of society could be better protected if the child were treated differently from adults, taking into account their physical, mental and affective characteristics.

In the light of an integrative perspective, of interweaving national norms into the universal and regional picture of human rights, we must bear in mind that the rights of children were recognised after the First World War, by the adoption of the Geneva Declaration of 1924, and were emphasised again in 1959, by the UN Declaration of the Rights of Children of 1959. On 20 November 1989, with the adoption by the UN of the *International Convention on the Rights of Children*, they have been recognised and accepted around the world. The Romanian Parliament ratified the Convention on 27 September 1990, and 14 years after assuming the obligations provided by the Convention, adopted Law 272/2004 on the protection and promotion of the rights of the child, considered a true Code of the child and family.

Recognising the rights of the child, we must also recognise the fact that they are an adult in the making. Most of the rights of the child are particular applications of human rights, for example: freedom of religion, the right to petition, freedom of expression. Moreover, the evolution of the world and of any society knows a permanent expansion of fundamental human rights and freedoms, along with the diversification of human needs and aspirations.

It is appropriate to conclude by drawing the idea deduced from the exploration of this section, namely the need for a much deeper focus on the personality rights regulated by the Civil Code when reflecting on children. The personality rights, though implicitly incidental to children, need an expanded vision, fused with the rights of the child and the principles revolving around the matrix of these special rights. The reason lies in their complexity, the rights of the child being carriers of hybrid legal valences. In this regard, the Declaration of the Rights of the Child states that: "*Due to the lack of physical and intellectual maturity, the child needs special protection and care, including appropriate legal protection, both before and after birth*".

Effects of Bullying on Personality Rights. Special Look at Dignity - Key Element for the Socio-emotional Development of the Child

"*The child must know that he is a miracle, that since the beginning of the world there hasn't been, and until the end of the world there will not be, another child like him*" (Pablo Casals).

In a cascading analysis of the elements that outline the present research theme, starting from the concept and regulation of the phenomenon of bullying, continuing with the development of personality rights in the light of the rights of the child, we reach the merging of the two by highlighting the imprint of violence on these inherent rights, which pertain to the essence of the human being.

In this picture of personality rights, human dignity should be seen as the foundation of the rights of the child and as a landmark mirrored in the need for a solid regulation of the phenomenon of bullying, since dignity outlines the personality and the human essence, ensuring the "foundation" of the personality of the child who became an adult. The philosophy of the concept of dignity is multifaceted, being a right inscribed in the international normative system. Aggressiveness, emotional harassment can have much more harmful and profound repercussions on the personality, closely related to the dignity and honour of the child, in relation to physical aggression.

Dignity must give meaning to the aspirations of the child in the construction of his own universe of values and beliefs, which he must also be aware of. The child must be aware that he is a unique being in the universe, capable of loving, exploring and evolving into a reality that he creates in relation to his self-esteem. In this sense, the generating elements of emotional intelligence are primarily related to awareness and reflection on our inner world, but also to curiosity about what is happening in the hearts and minds of others. We humans have evolved to be highly sensitive to others, and there is no doubt that we possess the necessary capacity to influence the inner states of those around us.

The educational act itself springs from human dignity, and just as there is no education without values, so there is no human dignity without values. Beyond all information and standardised tests, the education every child deserves is about dignity. As Louis Cozolino states, "*our brains have been shaped to look, listen and tune in to those around us. We imitate behaviours and resonate with the emotions of others in ways that bring us together*". As authority figures, teachers develop a real connection with students' brains. Let's not forget about the phenomenon "*mirror neurons*", capable of providing an elementary basis of imitation and intersubjective resonance, such as empathy or compassion.[34] It is thanks to these neurons that we are able to maintain a skill, if only we imagine it in

[34]This group of neurons, the so-called "mirror neurons", were discovered in 1996 by the team of Giacomo Rizzolatti, in Parma, Italy, their defining characteristic being that of activation to certain movements of people around, to give a meaning to the respective behaviour. At the same time, mirror neurons are able to perform a kind of simulation in a virtual reality of the actions of the other person, and help us understand the way of thinking of the other person, the way of feeling, through the intuition of actions and the interpretation of gestures.

detail, a skill that is not only not lost over time, but also kept intact. Moreover, Dr Daniel Siegel, a neuroscientist, has studied the link between mirror neurons and people's ability to feel empathy, with imaging research showing that while we observe the behaviour and deduce the emotional state of other people, the same neural structures are stimulated in our brains that are activated when we ourselves experience the emotions related to them. As stated by G. Rizzolatti, "*our survival depends on understanding the actions, intentions and emotions of others...and mirror neurons allow us to understand the intentions of others not through conceptual understanding, but through direct simulation... FEELING, not THINKING*".[35]

With this responsibility, teachers must learn about conscious and unconscious emotions, due to the influence they have on students and the culture of the class. Or, most children end up entering the "war" of dignity, coming into contact with various episodes of humiliation at school, bullying from peers, constant labeling even from teachers or administrative staff, up to parents dissatisfied with school performance. Bullying has become a national concern, which has received more attention in recent years, although real awareness of the effects of this phenomenon does not exist. Beyond the content of the educational curriculum, teaching methods or multiple learning styles, we need more reflection on the dignity of children in the context of bullying. How often do we view children from the perspective of dignity?

Children are different, perceive things differently, have different beliefs, values and habits. Children have dignity regardless of ethnicity, language, nationality, age, gender, religion, ability or any other characteristic. Also children are those who use bullying as a form of manifestation of power, physically, but especially psychologically, hurting other children. The fact is that the values and principles outlined since childhood and transmitted, propagated both in the family and in the educational environment, play an essential role in the formation and development of the child. These values will be the echo and foundation of the child's further actions, which will be reflected in wisdom, love, respect, integrity, solidarity and self-control.

> *"After all, where do universal human rights begin? From small places, so close and small that they can not be seen on world maps [...] in such places every man, woman and child seeks equal justice, equal opportunity, equal dignity, without discrimination*"
> (Eleanor Roosevelt).

How Does Bullying affect the Psycho-social Development of the Child?

Perhaps the most representative forms of bullying on the child are impairment of dignity, depression and anxiety, having a negative impact on the development of the child in the long term, future adolescent and adult. Abused children are unhappy, have insomnia, altered appetite, desire for isolation, school dropout, and

[35]Institute of Somato-Integrative Linguistic Neuro-Programming. https://www.inlpsi.ro/dezvoltare-personala/neuronii-oglinda-cum-ii-utilizam-in-construirea-unei-vieti-asa-cum-ne-o-dorim

the dramatic note is given by low self-esteem and self-confidence, which can end with thoughts of suicide. Most of the time they feel anxious, ashamed and even guilty for what happened to them, choosing to suffer in silence. However, this burden only has a very negative impact on the life path of the aggressed child. Children resort to silence because of the belief that they will be mocked if parents come to school and notice this situation, because of the fear that they will be labeled or the concern that teachers cannot help and defend them because such behaviours occur when there is no adult supervision.[36]

Furthermore, with a decrease in self-esteem, victims of bullying are afraid to make new friendships, as confidence in their peers also decreases. The negative consequences are reflected not only on mental health, but also on school results, bullying diminishing the motivation to go to school and learn. For example, Dr Andre Sourander, professor of child psychiatry at the University of Turku - Finland, published a study showing that children exposed to bullying at an early age are at increased risk of depressive disorders and are more likely to require psychiatric treatment at some point in their lives[37]. Moreover, depression caused by bullying can trigger other problems if not treated in time, such as drug or alcohol addiction in order to disconnect from reality. Specialists claim that in some situations, victims of bullying phenomenon will face psychological problems including in adult life, depressive symptoms[38] increasing with age. On the other hand, aggressors or perpetrators of bullying often face depression and mental health problems, but their way of dealing with depression is obviously wrong, manifested by conduct disorders and increased aggression.

Researchers have developed the "self-determination theory" (SDT)[39], this representin one of the most influential models in contemporary behavioural science, which provides a broad framework for understanding the factors that promote human motivation and psychological development. Self-determination theory explores intrinsic motivation, internalisation, individual differences, basic needs, goals, aspirations and close relationships, the impact of different parenting and educational practices having an essential role on the processes of identity formation and psychopathology of a child's development. Thus, for a harmonious development, the child has three essential needs: the need for relationship/ connection by establishing and maintaining safe and satisfactory relationships, the need for competence manifested by the child's desire to do something good, to experience and the need for autonomy/control. By exercising aggressive behaviour, these needs are not only not met, but also blocked, deeply affecting the dignity and development of the child.

Moreover, bullying is a model of social communication and interaction that not only affects the victim, but affects all participants. Obtaining a privileged

[36]Neagoș (2023).
[37]Sourander, Jensen, Ronning, Niemelä, Helenius, Sillanmäki, Kumpulainen, Pike, Tamminen, Mollanes & Almqvist (2007) apud https://psihologia.ro/noutati-din-psihologie/psihologia-adolescentilor/efec tele-bullying-ului-asupra-copilului-depresie-anxietate-sinucidere/.
[38]World Health Organisation. Depressive disorder (depression), 31 March 2023 - https://www.who.int/news-room/fact-sheets/detail/depression.
[39]Ryan & Edward (2017).

status in the group is one of the most important reasons that underlie the manifestation of bullying behaviour, such children wanting to be seen, to have spectators, believing that they can get the respect of others by inducing fear. Usually, those who occasionally show bullying behaviours have also been in the role of victim at some point, believing that the only way to survive is to be stronger than others and manifest your strength. Thus, children who harass other children are also insecure, they also have internal trauma not properly managed in their families, the emotional baggage in the family being mentioned in the literature as a trigger for the behaviour of the aggressor, but also of the victim. Or, domestic abuse, combined with the lack of clear and reliable rules in the educational environment, with the lack of self-esteem, shyness, passivity or insecurity, can catalyse the adoption of aggression and victimisation behaviour. Studies indicate that most school aggressors also have problems with the law in adult life, with bullying-type aggression paving the way for delinquency and criminality.[40] Children have the personality in formation, being like an "information sponge", and any information they receive, they store and transform it into their reality. This information is not filtered by the maturity specific to adults and leads to their imprinting as normality, there being a tendency to reproduce such aggressive behaviours in adult life. Why? Due to the lack of awareness of the cause of the behaviour. Aggressive behaviour is reinforced all the more when the aggressor successfully dominates the victim and when he/she is not sanctioned either. It requires the effective reaction of the teacher after each episode of aggression, otherwise bullying-type aggressions continue to repeat in the future. For this reason, it is recommended to promote in schools the "zero tolerance" policy, in the sense that no act of aggression should be tolerated in the educational space.

The dignity of the child is fueled by smile, approval, encouragement, confirmation, trust, but also individualised approach. The teacher, in turn, must realise that each child is endowed with dignity, which has the role of contributing to the increase of the child's self-esteem by the very way he greets them, the way he calls them. In this sense, prevention through development, as a form of social prevention, aims to develop social skills in children as well as the early detection of behavioural disorders. This form of prevention is early, focused more on children than adolescents, and is carried out by the family and school. Specialists consider the school to be the most favourable environment to prevent juvenile delinquency because it has the levers to order peer-to-peer interactions[41].

For example, Maria Montessori, an Italian physician and educator, created a special method of educating children, known today as the Montessori method, through which she contributed precisely to the crystallisation of the dignity of the child through education, having a special and unique way of understanding the role of the teacher in the child's life. This saw the child as a sacred being, whose dignity must be respected. Thus, she considered that a child should come to school with joy, aware of the fact that he/she is evolving, that he/she is valued and respected. In this way, respected dignity leads to the improvement of the socio-

[40]Farrington (1991).
[41]Rutter, Maugham, Mortimore, Ouston, & Smith Gottfredson (1979).

emotional development of children, since they need to feel most important at the stage of schooling. Only in this way will the motivation for learning and the joy of evolving every day spent at school be created.[42] The school must provide children with the necessary ability to respond in a creative way to everything different, to situations of uncertainty, the student needing contexts in which to experience, in which not only the experience of knowledge, but also emotion and ethics are involved.

The "decanting" of personal life remains a real experiment for students, teachers and parents, an exercise that can reveal deep aspirations related to the purpose and desires of the child.

"The last test of a moral society is the type of world it leaves to its children" (Dietrich Bonhoeffer).

Instead of Conclusions: The Need for a Vision *Inter and Transdisciplinary* in "Shaping" Future Human Behaviours

Of course, bullying and the consequences of this phenomenon on human rights offer a possible transposition into inter-and transdisciplinary models of analysis, being needed the awareness and protection of the sacredness of the "inner universe" of the child, shaped by what means dignity, honour or freedom of thought and faith, that is, the essence of the human being projected in what we call personality rights.

This article particularly explored the concept of human dignity in the light of the rights of the child, as a central concern for the future of education, requiring a genuine understanding of human dignity in educational "discourse" to ensure ethical integrity in future societal practices. Moreover, the recognition of human dignity, in its authentic form, has become a real challenge, there are eloquent examples of error in interpretation, which exploit the multiple meanings of keywords or expressions such as "human dignity" or "individual autonomy", in this language of rights, apparently universal, there is no consensus on the moral basis or on the precise meaning of dignity or humanity. Going into the depth of interpretation, the word "dignity" is derived from the Latin *dignus*, which refers to *decet*, to which two nouns are attached: *decus*, decor. *Decus* means "decor, decency, dignity", hence "honor" and "beauty". Isidore of Seville states that "decus refers to the soul or spirit, decor to the shape of the body". Decency and genuine beauty are truly found in the beauty of human relationships, namely in friendship, which Aristotle rightly appreciated to be what is most necessary for a human life. In the "beautification" of inter-human relations, the "wisdom of love" becomes essential.[43]

In addition, human dignity was associated with our rational nature and the resulting freedom of will. Freedom expresses the core of the human condition, its two essential components being intelligence and will. Hence the nobility of human

[42]Velici (2017).
[43]De Koninck (2024).

beings, from the freedom that is due to them and especially from the belief that they are created "in the image and likeness of God", human dignity can never be lost.

Obviously, such research cannot be limited to the legislative perspective, but must be interwoven with notions of psychology, philosophy, religion, neuroscience, neuroplasticity or medicine, which "enrich" in analysis and interpretation, through a holistic vision that transcends boundaries and rigid frameworks such as the exclusive fields of a discipline. In a realm of the analytical follow-up, we tend to start from the premise that transdisciplinarity represents an abstract, purely theoretical, philosophical notion, but we cannot deny its profound, marked imprint on society in general, man by his nature being a complex being, who lives, creates, builds and evolves in a world "hit by the magnitudes of challenges", in which thoughts, information, aspirations, beliefs, needs and ideas intersect and intertwine in a permanent attempt to achieve perfection and to find himself.

Interdisciplinarity and transdisciplinarity become key elements of adaptation and response to the diversity of changes as a whole, the law being after all "a living instrument", constantly "reshaped" by the given context.

One of the great issues debated in Western civilization is whether, as Jean-Jacques Rousseau predicted, we are born good and willing to cooperate with each other before society corrupts us, or whether we are born selfish and it is society that shapes our behaviour for better or for worse. Neurosciences confirm that by the age of four the structures of the cortex become operational, which allow the nuanced regulation of emotional episodes triggered by the more primitive brain networks related to fear, anger or desire. Thus, the further evolution of these predispositions towards altruistic behaviours or towards violence depends on a large number of internal and external factors.[44]

Jean-Jacques Rousseau stated in his famous work "Emil, or On education" that "it is overlooked that the human race would have perished if man had not begun by being a child". In other words, the adult could not become what he is if he does not go through this specific period of childhood, with its peculiarities determined by the way of knowing, thinking or feeling. The mature man is therefore the result of the accumulation in the course of time of a baggage of knowledge that begins to form from childhood, and Rousseau urges to respect this period of human life even if it is an imperfect one, mirrored in age-specific vulnerabilities.[45] The individualisation of childhood as an essential stage in human evolution has been achieved over time by the very institutionalisation of education. Sociology and psychology are the ones that redefined the image of the child, as an autonomous being, only at the beginning of the twentieth century developing the idea of treating the child differently from adults.

Looking from an angle of psychology, we will find the children's need for intrinsic motivation, motivation that comes from the awareness and unalterability of dignity. At the same time, in the view of psychologists and researchers, in order for altruism, generosity and empathy to remain on the line of generations, they must be associated with mechanisms that protect individuals against their

[44]Ricard (2024).
[45]Drăghici (2013).

exploitation by others. Regarding the moral sense, psychologists consider that it results primarily from intuitions, to which is later added a reflection that results from a conscious process and reasoning, proving through studies that the fulfillment of this moral consciousness in children is favoured by the affectionate behaviour of parents. Consequently, the family environment and implicitly the educational one can become the emergence or regress of aggression in childhood. *Exempli gratia* in 1994, a revolutionary movement on "social and emotional learning" emerged in the United States as the foundation for the development of emotional intelligence in children by integrating emotional education into schools and teaching a special course called "Social and Emotional Learning". The ultimate goal was, of course, to extend to the entire population through the awareness and imprinting of emotional intelligence in the structure and personality of the child, considering that the major problems that affect the human being and cause violence are promoted by the same emotional and social risk factors. What remains true today, the promotion of such disciplines in schools can generate new behaviours, much more sensitive and empathetic, that contribute positively to the future of society. Going back far in time, we will find, moreover, that the *paideic* purpose of education is one rooted in the culture of mankind. *Paideia* signified, in the culture of ancient Greece, the education of the inhabitants of the polis in accordance with the values of humanism.

From an aspirational philosophical perspective, the child, in turn, must become aware of the interdependence[46] of all things. In this sense, a good education aims to acquire a holistic vision by the child, so as to position himself correctly in relation to everything around him, to contribute constructively to the society in which he evolves, focusing on cooperation and solicitude, and not on competition and indifference. The child must be invited to assert his own autonomy, which is manifested only in the awareness of his own value. Research shows that devaluation causes the child to hate himself, be violent to himself, and harbour a repressed anger against others. Obviously, the best way is affection, harmony in relations with others, the consequences of deprivation of affection are dramatic. In fact, researchers have established that there is a strong link between physical violence and a child's low level of empathy and sociability,[47] being undoubted that the magnitude of love and tenderness that the child receives in childhood, profoundly influences the role of his existence.

At the same time, scientific research on neuroplasticity shows that our fundamental traits, resulting from the combinations of genetic inheritance and the environment in which we grew up, are only the basis, since any form of training can induce a restructuring in the brain, both functionally and structurally. Or, if we want a better modeling of the behaviours of children, future adults oriented towards building a more altruistic society, it becomes important to evaluate their respective capacities for change, since if we do not transform man first, we cannot transform society either.

Incidentally, such awareness should also be an impetus for contemplative sciences, in the sense of resilience or capacity to overcome adversity and self-

[46]Fernandez-Berrocal (2021).
[47]Cyrulnik (2004).

evaluation, by improving self-esteem, self-compassion and accepting one's own weaknesses, discovering the "world of emotions" in a positive sense.

According to the researchers, there are three main factors that oppose the desire to do harm, namely - altruism or benevolence, which makes us sincerely interested in the fate of others, control of emotions, which helps us to restrain our momentary impulses, and moral demands, which make us hesitate in wanting to harm others, but also regret it.[48] As Mahatma Gandhi said "*nonviolence is a powerful and just weapon, which cuts without hurting and ennobles the man who wields it...it is a sword that heals*".

It is appropriate to conclude by drawing some main ideas of the present research, among which we mention the need for a much deeper focus on the personality rights regulated by the Civil Code when they are reflected on children. The personality rightsneed an expanded vision, fused with the rights of the child and the principles revolving around their matrix. The reason lies in their complexity, the rights of the child being carriers of hybrid legal valences, which imply a transposition in the interpretation of the personality rights when targeting the child. Consequently, the rights of the child are susceptible to an extensive conceptualisation, by circumscribing in their content some norms but also directions of action created under the auspices of a laborious inter and transdisciplinary analysis, which would concretise the social and psychological dimension in the content of regulation and interpretation.

Achieving a greater degree of awareness of the effects propagated on the rights of the child's personality, would certainly be achieved through a special regulation of bullying, addressed *in globo*, the effectiveness of the applicability of these provisions being conditioned by a high degree of descriptivism of the conditions of existence and manifestation of the phenomenon of bullying type.

Currently, there are a number of regulations at national level regarding the prevention, combating and sanctioning of bullying and cyberbullying, but they are disseminated in multiple normative acts such as the education law, the Order of the Minister of Education, the Law no. 272/2004 on the protection and promotion of children's rights or even in administrative acts issued at the level of educational institutions, concretised in internal methodologies or procedures. Or, a simple article on the definition of bullying, incorporated in other special laws, cannot generate the necessary echo of awareness of the multiple effects of this phenomenon on the rights of the child. For example, Law no. 272/2004 on the protection and promotion of children's rights, which creates the general legal framework at national level on the observance, promotion and guarantee of the rights of the child, limited itself in regulating, on the one hand, the obligation of the Ministry of Education to take measures to "*prevent and combat aggressive behaviour, exclusion, derision, humiliation, and any other form of psychological violence - bullying, as defined in the National Education Law, directed against children, in educational establishments*", by introducing letter h) to Art. 52, and on

[48]Ricard (2024).

the other hand, in promoting mediation and dialogue, as a way of addressing this phenomenon as a priority, by introducing par. (2^3) in the same article.[49]

The dissemination of these regulations in various normative or administrative acts only bypasses the requirements of clarity, and predictability associated with a special law, generating chaos in application, legal framing and sanction, which does not allow, of course, a harmonious and generous development of case law in the matter. A concerted action, which should be explored at national level and which would be reflected in uniform accountability, would be the drawing up of a complete and complex normative act on the phenomenon of bullying, which would develop special principles in light of the rights and best interests of the child, the rights of his personality, to outline specific attributions, responsible institutions and sanctions, unifying in a common corpus all the legal provisions regarding bullying specific to the educational environment and not only. At the same time, a profound echo of awareness, accountability and harmonisation regarding the approach of the bullying phenomenon and its consequences on the dignity of the child, would occur through the adoption of a legal instrument such as *hard law* at the level of the European Union. Such a legal instrument claims its existence through the importance we must attach to children, their rights and the importance of "shaping" for the better the behaviour of today's children and tomorrow's adults.

Final Thoughts

We are talking about a huge responsibility, that of cultivating good, altruistic love, gratitude, compassion and empathy, through their awareness and interiorisation by children, so that the society of today and tomorrow is not reflected deformed in the "mirror of universal rights and freedoms".

"*The greatest glory of a free-born people is to transmit that freedom to their children*" (William Havard).

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[49]"*Preventing and combating any form of psychological violence-bullying in schools is carried out in compliance with the principle of the primacy of non-punitive measures based on mediation and dialogue and of the participation of children and parents in the actions and campaigns carried out in this regard*". - Art. 52 (2^3) of Law no. 272/2004 on the protection and promotion of children's rights.

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Life after Death? Legal Relations of Companies after Cessation of their Legal Existence

*By Julita Zawadzka**

The cessation of the legal existence of a company affects many entities that have entered into legal relations with it. Above all, its unsatisfied creditors are affected, but the legal situation of the company's shareholders is also altered. Legislators approach the issue of the cessation of the company's legal existence in different ways and address the problems related to the status of the legal relations of the defunct company differently. The paper presents the two main approaches legislators adopt in this regard in several European jurisdictions (Italy, Poland, the United Kingdom, Germany, France, Spain and Switzerland) and discusses models that exemplify each approach. The study points out the strengths and weaknesses of these approaches and various models, paying particular attention to the way in which the interests of stakeholders and shareholders are balanced and how legal certainty is addressed in each of them. The paper seeks to answer the question of whether it is legitimate to build parallels between the cessation of the legal existence of an individual and a company and to draw on institutions known from succession law when regulating the legal relations of defunct companies.

Keywords: *Defunct company; Striking off; Legal succession; Liquidation; Creditor's protection*

Introduction

Regardless of the jurisdiction, it does not pose serious difficulties for lawyers to determine what happens to the legal relations concerning an individual after his or her death. Over the centuries, the rules of succession in the various jurisdictions have already been shaped. Matters become more complicated regarding legal entities other than natural persons. While companies[1] cannot die, they can cease to operate and lose their subjectivity under the norms of the legal system, which has equipped them with legal subjectivity. Just as legal norms regulate the formation of a company, they should also regulate the termination of a company's legal existence. This is because the termination of its existence affects all those who enter into legal relations with the company (stakeholders). Sometimes, the solutions adopted by legislators to address this problem are based on drawing an analogy between the "life" of the company and the life of a human being, as it seems tempting to reach for the known and stabilised rules of inheritance law.

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[1]The terminology used in different jurisdictions to describe a capital company varies. In this paper, the term "company" will be used to refer only to a capital company and does not include a partnership.

However, is drawing such a parallel the right way? This study aims to find an answer to this question.

The stimulus to take up the topic of the legal relations of defunct companies was a critical assessment of the solution adopted in 2015 by the Polish legislator, prompting consideration of whether there are better models for shaping legal relations after the company's deregistration. In order to find an answer to this question, the solutions adopted in 7 European legal orders were studied (besides Poland, these were: Italy, the United Kingdom, Germany, France, Spain and Switzerland). The solutions functioning in practice in these jurisdictions were analysed. This means that apart from the analysis of statutory provisions and doctrinal positions, great attention was paid to the case law, especially of the highest judicial authorities.

The assessment of which model is "better" requiring prior identification of evaluation criteria. This study analyses the rules governing the cessation of the company's legal existence from the point of view of whether they appropriately balance the interests of the company's environment: on the one hand, the creditors, including employees, agents, *etc*., and on the other hand, the shareholders. Thus, attention was also paid to whether the basic principles determining the functioning of a given type of company were taken into account, *e.g*., the principles of unlimited liability of the company with all its assets towards its own creditors and limited liability of the shareholders towards the company's creditors. However, balancing the interests of stakeholders and shareholders is not enough. Another important factor that should be taken into account by the legislator is the certainty of legal relations, *i.e.*, the clarity and stability of the legal situation of all parties involved.

The study has shown that there are two main approaches taken by legislators with regard to the cessation of the legal existence of companies. The following sections will first outline the key difference between these approaches. Each approach will then be characterised, with the identification of models that are examples of the application of each approach. Each model will be analysed from the point of view of the criteria listed above. This will allow final conclusions to be drawn as to which approach better meets these criteria.

Approaches for Determining the Cessation of the Company's Legal Existence

The analysis of solutions adopted in various jurisdictions allows us to draw a distinction between two basic approaches to addressing the cessation of the legal existence of a company. The first approach anthropomorphises the company. It includes models which attempt to solve the problems of termination of the company's legal existence by drawing analogies (sometimes very far-reaching) with the cessation of the legal existence of individuals. These models transfer certain legal concepts known from the law of succession to the field of corporate affairs. The second approach avoids such anthropomorphising, perceiving that a company is an entity with significantly different purposes and of a different nature than an individual. Therefore, its legal subjectivity also requires a different

approach. Models adopting the latter view are driven by an understanding of the company as an asset serving a specific purpose, or as a legal construct necessary to link rights and obligations to it ('point of attachment', "subject of attribution").

In essence, therefore, the divergent approaches to the question of the cessation of the legal existence of companies are to some extent a reflection of various theories of legal persons developed by legal doctrine: on the one hand, naturalistic theories, seeing legal persons as real entities behind which individuals are concealed, and on the other hand, theories of fiction and theories of special-purpose assets[2].

Anthropomorphising Models

Characteristics

The anthropomorphising view of the company essentially leads to the conclusion that, just as an individual at some point terminates their legal existence, and this effect is both inevitable and irreversible, the same fate awaits the company: a definitive end to its "life". Therefore, just as an individual has an heir, a universal legal successor, so too should a company have a universal successor to take its place in legal relations and to fill the "vacuum" left by the "deceased" company. Fully anthropomorphising models can thus also be called models based on universal succession.

Legal solutions following this view have certain advantages, the most significant of which is the certainty of legal relations. This concerns certainty in three aspects. Firstly, at a precisely defined point in time, the company loses its legal existence and ceases to be a party to legal relations. It is known precisely when the legal situation of the entire company environment changes. Secondly, the loss of the company's legal existence is definitive and irreversible. As with individuals, it is certain that there is irrevocably no return to a situation in which the "deceased" company can regain its existence as a legal subject. Thirdly and finally, this model offers a relatively simple answer to what happens to the legal relations in which the company has hitherto participated. This is because, in principle, all of these legal relationships are entered into by a universal successor; therefore, these relationships do not extinguish.

The implications of this approach are indeed appealing. In the light of the assumptions of the fully anthropomorphising models, it should be immediately clear who should take legal action in cases where debts uncollected by the defunct company remain; it should also be clear to whom assets would accrue if after the company's legal existence has ceased, it was to turn out that certain assets remained undisposed of by the company before its "death". Anthropomorphising models also presuppose certainty as to whom creditors and anyone else with an unfinished legal relationship with the company should turn to.

[2]These theories are familiar to every lawyer; they are presented by, among others, Simonart (1995) at 23-37.

The two main decisions facing legislators opting for this model are to prejudge who is to be the universal successor to the company and how the principles of liability of this successor for the obligations it has "inherited" from the defunct company should be shaped. In making these decisions, the interests of stakeholders and shareholders need to be appropriately balanced, as the factor of legal certainty has already been duly taken into consideration by the very fact that the universal succession model has been chosen.

Only two of the seven European jurisdictions investigated for this study (Italy and Poland) fully adopted this model. The third jurisdiction (the United Kingdom) also prominently uses the anthropomorphising approach, although due to the different succession law principles, anthropomorphising leads to slightly different results in the United Kingdom than in Italy or Poland.

Thus, as can be seen, it is not an uncommon approach, which is probably determined by its main advantage highlighted above: the certainty of legal relations after the end of the company's operation. However, the question to be answered is whether models adopting this view do not lean too much towards respecting legal certainty at the expense of a proper balance of stakeholders' and shareholders' interests.

It turns out that in each of the fully anthropomorphising models (Italian and Polish), the two mentioned issues requiring fundamental decisions by the legislator (who is to be the universal successor of the company and how the principles of liability of this successor for obligations "inherited" from the defunct company should be shaped), are resolved in a fundamentally different way. What these systems have in common is, firstly, the assumption of irreversible and definitive cessation of the legal subjectivity of the company at the moment of the company's deletion from the public register, and secondly, the entry of the universal successor into the legal relations of the company at that very moment.

Italian Model

In Italian law, it is assumed that it is the shareholders of a "deceased" company who become its universal successors (co-successors)[3]. The statute does not expressly proclaim this principle, but this conclusion is derived from art. 2495(3) *in principio* of the Italian Civil Code (*Codice Civile*, CC), from which it follows that, although the company is extinguished as a result of its striking off from the register, the company's unsatisfied creditors may still enforce their claims

[3]Of key importance are three rulings of the combined chambers of the Italian Supreme Court (*Corte Suprema di Cassazione*, CSC) of 12 March 2013 nos. 6070, 6071 and 6072, and the earlier three rulings of the combined chambers of CSC of 22 February 2010, nos. 4060, 4061 and 4062; see also, *inter alia*, rulings of CSC Civil Chamber I: of 6 December 2019, no 31933, of 22 May 2020, no 9464 and of 13 October 2021, no 27894. In the doctrine, the proponent of this position is in particular Speranzin (2004) at 514 *et seq*.; Speranzin (2014) at 254. However, there are also strong objections (Sanna (2015) at 80/II *et seq.* and the criticism cited therein). The current position of jurisprudence has been taken since the reform of Italian company law introduced on 1 January 2004 by the Legislative Decree no. 6 of 17 January 2003. Previously, it was accepted in case law that a company "is always alive" as long as there remain unfinished legal relations involving it (cf. the reasoning of CSC ruling of 22 May 2020, no 9464, cit.).

against the shareholders. As, in the light of the provisions on the liquidation of companies, the shareholders are also entitled to the assets remaining after the liquidation[4], it is to them that any assets that emerge after striking off the company from the register accrue. It is, therefore, the shareholders who are entitled both to assets that have been omitted and not liquidated (*sopravvivenze*; "survivals") and to those that only came into existence after the company has been struck off the register (*sopravvenienze*; "contingencies")[5]. The same applies to overlooked liabilities of the company and liabilities that have arisen after the company's striking off: these pass to the shareholders as well[6]. Thus, legal relations not terminated before the company was struck off the register continue in a specific way[7].

This solution seems to consider the interests of creditors, as their claims are not extinguished due to the debtor's absence when the company ceases to exist. The former shareholders become their debtors. At the same time, the shareholders' interests are considered, as their rights to the liquidation surplus, if any, are respected. This solution also takes into account the basic principle that the company is liable for its obligations with its assets and the shareholders only with their contributions. These principles are still respected after the company ceases to exist. Shareholders are only liable to the company's unsatisfied creditors up to the amount of the sums received on the basis of the final liquidation balance sheet[8]. Those sums are the remainder of the company's former assets with which the company would have been liable to creditors if its legal existence had not been terminated. For the same reason, it is assumed that the shareholders are also liable towards the company's creditors with assets omitted during liquidation, which only came to light later (*sopravvivenze*), as well as those which only arose after the company was struck off the register (*sopravvenienze*)[9]. Regarding pending litigation, the cessation of the company's legal existence and the entry of successors in its stead takes place according to the same rules as in the case of inheritance[10].

For unsatisfied creditors, this may still not be sufficient. In principle, however, only the company's assets provide a guarantee for the satisfaction of its creditors. In principle, as another advantage of the universal succession for the company's creditors is that, since their claims do not expire, neither do the securities of their claims that were of an accessory nature. The creditors can still exercise these securities.

However, the final outcome of the Italian model seems to fall to the disadvantage of the company's creditors, especially in companies with multiple

[4]Art. 2492(1) first sentence CC.
[5]CSC rulings of 12 March 2013, nos. 6070, 6071 and 6072, cit.; CSC ruling of 22 May 2020, no 9464, cit.; see also Speranzin (2014) at 254, 256.
[6]CSC rulings of 12 March 2013, nos. 6070, 6071 and 6072, cit.; Speranzin (2014) at 255.
[7]For the sake of accuracy it should be noted, however, that in several situations arising from case law it is permissible to reinstate an erroneously struck-off company in the register by applying art. 2191 CC. These cases are discussed by Sanna (2015) at 85/II-86/II.
[8]Art. 2495(3) first sentence CC.
[9]CSC rulings of 12 March 2013, nos. 6070, 6071 and 6072, cit.; Speranzin (2014) at 254, 255.
[10]CSC rulings of 12 March 2013, nos. 6070, 6071 and 6072, cit.; Speranzin (2014) at 254, 257.

shareholders. For creditors, this generally means they have to enforce their claims against all of the shareholders, as the amounts to which individual shareholders are liable may not be sufficient to satisfy the creditor[11]. The exercise of creditors' claims is also hindered by the lack of one representative of their new debtors. For all unfinished company matters, interested persons must address all shareholders. Another impediment for creditors is that the statute does not provide for any separation of the assets "inherited" by the shareholders from the extinguished company from their own assets, with the result that former creditors of the company wishing to obtain satisfaction from the shareholders, have to compete with the shareholder's creditors[12]. Shareholder succession results in a kind of "dilution" of liability towards unsatisfied creditors.

Polish Model

A different solution has been adopted in Polish law. It is a relatively new regulation, as it entered into force in 2015[13]. Previously, the issue of the consequences of the cessation of the companies' legal existence was not regulated in any way, and the practice went in all conceivable directions[14], making the intervention of the legislator inevitable[15]. Since 2015, Polish law has been characterised by the assumption of the irreversible and definitive cessation of a company's legal existence at the moment of its striking off from the register and the entry of a universal successor into the company's legal relations .

The universal successor of "deceased" companies is the State Treasury. It enters into all the rights and obligations of the defunct company[16]. Thus, as in Italy, the company's property does not become ownerless, and its debts are not extinguished when the company is struck off the register. It is argued that the choice of the State Treasury as successor, rather than the shareholders, is due to the fact that the shareholders could deliberately conceal the company's assets during

[11]Sanna (2015) at 84/II. Some facilitation for creditors was to be provided by the regulation stipulated in the second sentence of art. 2495(3) CC. If creditors submit their claims within one year of the company being struck off the register, it is sufficient to notify the claims to the address of the defunct company. However, this does not mean that creditors are relieved of the obligation to establish the circle of shareholders, which can be difficult in case of joint-stock companies (cf. Sanna (2015) at 84/II).

[12]Sanna (2015) at 84/II.

[13]Art. 25e of the *ustawa o Krajowym Rejestrze Sądowym* (National Court Register Act; NCRA) of 20.08.1997.

[14]Each of the solutions proposed in legal doctrine and jurisprudence had the fundamental deficiency that they were unfounded in the light of the provisions of the then applicable law. The proposed solutions are summarised, among others, by Klepacz (2012) at 39-43; A. Witosz (2014) at 187-188; Węgrzynowski (2014a) at 25–31; Węgrzynowski (2014b) at 8-13.

[15]The solution chosen by the Polish legislator was not the one recommended; cf. Wild (2013) at 40-43.

[16]The acquisition by the State Treasury of all the assets of an entity removed from the register is expressly provided for in art. 25e(1) NCRA. The conclusion that the State Treasury enters into all the liabilities of entities deleted from the register is derived by way of interpretation in particular from art. 25e(4) NCRA (see most recently the resolution of the Polish Supreme Court (*Sąd Najwyższy*) of 20 April 2023, III CZP 122/22, *Biuletyn Sądu Najwyższego – Izba Cywilna* 2023, issue 5-6, with comment of Zawadzka (2023) at 87 *et seq.*).

liquidation in order to acquire them when the company is struck off the register[17]. The State Treasury's succession is, therefore, intended to protect the creditors. The successor, however, is not liable for the company's obligations with its own assets, but only with those items of property that it "inherited" from the company (liability limited *cum viribus patrimonii*)[18]. As for pending litigation, the cessation of the company's legal existence and the entry of the successor in its place follows the same rules as in the case of inheritance.

After striking off the company from the register, Polish law does not provide for shareholders' liability towards the company's unsatisfied creditors with the liquidation quota received by the shareholders[19]. During the liquidation procedure, distribution of the company's remaining assets is permissible after a certain period calculated from the date of an announcement on the opening of liquidation, summoning creditors to submit their claims[20]. The claims known to the company, including those that were notified within this period, are to be satisfied or secured by the liquidators. However, creditors whose claims were neither reported in due time nor known to the company may only claim satisfaction from the company's assets not yet distributed among the shareholders[21]. If the shareholders received liquidation quota in violation of art. 286(1) CCC (art. 474(1) CCC for SA) or they received overstated liquidation quota while being in bad faith, they are obliged to return the amounts received to the company[22]. It is the obligation of the liquidators to recover these amounts from the shareholders on behalf of the company. The liquidators shall be liable to the company for damages for failure to comply with this obligation[23]. The company's claims against the shareholders, as well as against the liquidators, are the company's assets, which are passed to the State Treasury when the company is struck off the register. The State Treasury may exercise these claims, while creditors should pursue their claims against the State Treasury[24].

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[17]Cf. resolution of *Sąd Najwyższy* of 24 January 2007, III CZP 143/06, OSNC 2007, no 11, item 166.

[18]Art. 25e(2) NCRA.

[19]Nowacki (2021) art. 287, marginal no 22.

[20]The time limit is 6 months for a limited liability company (sp. z o.o.; art. 286(1) of Polish Code of Commercial Companies of 15 September 2000, *Kodeks spółek handlowych*, hereinafter: CCC) and one year for a joint-stock company (SA; art. 474(1) CCC). Cf. art. 300^{121}(3) CCC for a simple joint-stock company (*prosta spółka akcyjna*; PSA).

[21]Art. 287(1) CCC in respect of sp. z o.o. and art. 475(1) CCC in respect of SA and PSA.

[22]With regard to sp. z o.o., see art. 287(2) CCC. For the SA, analogously, art. 475(2) CCC; cf. art. 300^{121}(3) CCC for the PSA.

[23]Cf. art. 293(1) CCC. A creditor may not, in his own name, enforce the liquidator's liability against the company or reimburse the company for the shareholder's inflated liquidation quota, but may, in enforcing his claim against the company, seize those claims of the company (cf. Witosz (2018) art. 287, marginal no 6; Nowacki (2021), art. 287, marginal no 23). Ultimately, therefore, the shareholders will be liable to the creditor up to the amount of the liquidation quota obtained in breach of art. 286(1) and art. 287(1)-(2) CCC). It is assumed that the creditors of a sp. z o.o. may also claim liability for damages against the liquidators (cf. art. 300 CCC) if they are the ones who have neglected to make a demand for restitution to the shareholder (Witosz (2018) art. 287, marginal no 6). For SA see art. 483(1), art. 490 CCC.

[24]Cf. Nowacki (2021) art. 287, marginal no 24.

However, with respect to the so-called late creditors, *i.e.*, those who did not submit their claims before the date on which the distribution of the company's remaining assets was permitted and were not known to the company, including those whose claims arose after the expiry of the aforementioned deadline, no liability of the shareholders with the liquidation quota received is provided for. The fact that the claims were legitimate is irrelevant. No consideration is given to the possibility that certain categories of claims (especially those in tort) may not come to light until later, after the distribution of the remaining company's assets, or even after the company has been struck off the register. Although, thanks to universal succession, these claims do not expire when the company is struck off the register, the substrate of assets from which they may later be satisfied is smaller due to the shareholder's lack of liability with the liquidation quota.

Such a solution violates (to the benefit of the shareholders and to the detriment of the company's creditors) the principle that a company is liable for its obligations with all its assets and that after the cessation of the company's activity, its assets constitute a kind of guarantee of satisfaction for its creditors. This principle should be respected also after the company's legal existence has been terminated, as Italian law (in this respect correctly) provides. Polish regulation insufficiently protects the company's creditors in this aspect, giving primacy to the shareholders' interests and clarifying their legal situation as soon as possible. On the other hand, an advantage of the Polish model, in comparison to the Italian solution, is undoubtedly the fact that firstly, the company's creditors have only one new debtor and do not have to pursue their claims against many successors of the company and, secondly, they do not have to compete with the State Treasury's creditors, as the property remaining after the company is allocated only to satisfy the company's creditors (at least it is temporarily, which will be discussed later).

On the other hand (this time, to the disadvantage of the shareholders and to the advantage of the State Treasury), the possibility for shareholders to assert their rights to supplementary liquidation quota in the event that, after the company is struck off the register, it comes to light that certain assets were not liquidated, is very limited. In Polish practice, such situations do occur, and the omitted holdings of the company are even immovable property. Formally, shareholders may direct their claims against the State Treasury, but this requires bringing an action within the preclusion period of one year from striking off the company from the register[25]. After that time, all shareholder claims expire irretrievably. The running of the time limit does not depend on any further circumstances, particularly when the unliquidated company's assets are revealed. If the property was only revealed after one year, the shareholders no longer have any rights to it. In addition, the shareholders may only claim their rights to their share of the unliquidated assets if they collectively represent at least two-thirds of the votes and prove that all the company's creditors have been satisfied or secured (art. 25e(3) NRCA).

Shareholders' rights are, therefore, not sufficiently respected either. Notably, the limitation of shareholders' rights to further liquidation quota after the expiry of the company does not necessarily benefit the company's creditors. It may well be that the only entity gaining will be the State Treasury. This is because also the

[25]Art. 25e(4) NCRA.

claims of the company's unsatisfied creditors expire irretrievably with the lapse of the one-year period counted from the striking off of the company from the register if those claims are not pursued against the State Treasury within that time[26]. Again, it is irrelevant when these claims come to light or when the property left by the defunct company, from which the State Treasury could be liable to creditors, was revealed. The deadline is very short and is the most criticised point of the Polish regulation. The excessive rigour of this time limit can be very well seen when one compares it with the general limitation periods for claims, which are three years in professional relations and six years in others (Article 118 of the Polish Civil Code).

On the one hand, the assumption of all debts of a defunct company by the State Treasury is supposed to protect these creditors – it is supposed to compensate for the fact that there is no possibility whatsoever of restoring the company once it has been struck off the register. However, on the other hand, this protection of creditors' rights is too tenuous as all their claims are extinguished after a year. Notably, these creditors are not always businesses, but those are just as frequently consumers. Still, the unified one-year deadline applies to all creditors. A further consequence is that as the creditor's claims are extinguished, the securities for their claims, which were of an accessory nature, are also extinguished. This excludes the exercise of, for example, a suretyship of an accessory nature.

The time limit for the expiry of creditors' claims essentially deprives the Polish model of one of the most significant advantages offered by the system of universal succession, which is the continuation of the company's obligations, albeit with a new debtor. One year after the expiry of the company, these liabilities are discontinued.

It is clear that in the model adopted in Poland, the scales have been tilted far too much in the direction of guaranteeing legal certainty, stabilisation and clarity of the legal situation of the interested parties (shareholders, creditors, but above all, the successor). Indeed, it cannot be denied that this aim is achieved by the Polish solution almost perfectly. It raises serious doubts, however, whether the interests of stakeholders and shareholders should be sacrificed to such an extent in the name of certainty of legal relations.

British Model

As mentioned, the anthropomorphising approach is also very evident in the model adopted in the United Kingdom. Indeed, it also draws from the solutions known from the law of succession. The company loses its legal existence at a specific point in time (the company „dies")[27]. Unlike individuals, the company

[26]Art. 25e(4) NCRA. See also art. 25e(6) NCRA.

[27]This effect does not take place on the striking off of the company from the register of companies, but on the publication in the Gazette of the notice that the company's name has been struck off the register, if the company is struck off the register without liquidation proceedings or after an improperly conducted liquidation (sec. 1000(4)-(6), sec. 1001(2)-(4), sec. 1002A(4)-(5) of the Companies Act 2006, CA). If striking off follows a winding up procedure, the company is dissolved at the end of the period of 3 months beginning with the day of the registration of the final account and statement sent under section 146(4) of the Insolvency Act 1986 (final

never has an heir. Thus, all of its assets become ownerless property (*bona vacantia*). This property passes to the Crown[28] unless the Crown's representative decides within 3 years that the Crown disclaims the title to it[29]. This solution is modelled on the English law of succession, where an individual's estate also passes to the Crown[30] if there are no heirs[31].

A public body can, therefore, acquire the assets of the defunct company. The liabilities, on the other hand, are essentially extinguished. The British model does not, therefore, assume universal succession of the successor in all the rights and obligations of the extinguished legal entity, as Italian or Polish law does. This is because, strictly speaking, universal succession understood in this way is unknown to the English law of succession.

Unlike in the case of succession to individuals[32], the Crown does not receive the assets only after the liabilities have been paid off (residuary estate). The liabilities are generally extinguished along with the company. The rights of creditors and all other persons having an interest are to be guaranteed by the institution of restoration of the deleted entry of the company to the register and, thus, the restoration of the company's legal existence[33]. The company's creditors are listed among entities entitled to apply to the court to restore the company to the register[34]. The general effect of the restoration is that the company is deemed to have continued its existence as if it had not been dissolved or struck off the register[35]. It must then be assumed that the company has never lost its property, its creditors' claims have never been extinguished, *etc*. There is, however, a time limit. As a general rule, restoration of the company cannot be requested more than 6 years from the date of the dissolution of the company[36].

The restoration undoubtedly constitutes an element alien to typical anthropomorphising approaches. Although the purpose of this institution is applaudable, as it allows the protection of the rights of those who had entered into legal relationships with the defunct company, in practice, the need to initiate a restoration procedure in each individual case where there is a need to protect the rights of third parties is burdensome and seriously hinders the assertion of those rights.

Non-Anthropomorphising Models

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account) or a notice, from the official receiver that the winding up of a company by the court is complete; however, the Secretary of State may defer the date at which the dissolution of the company is to take effect (sec. 205(1)-(3) of the Insolvency Act 1986; cf. also sec. 202(5) and sec. 204(4) of the Insolvency Act 1986).

[28]Or the Duchy of Lancaster or the Duke of Cornwall (sec. 1012(1) CA).

[29]Sec. 1013 CA. The provisions of the CA relating to the acquisition by the Crown of the property of a company struck off the register also apply to companies dissolved following insolvency proceedings (Goode (2011) at 216).

[30]Or to the Duchy of Lancaster or to the Duke of Cornwall.

[31]Sec. 46(1)(vi) of the Administration of Estates Act 1925.

[32]Kerridge (2013) at 423.

[33]Sec. 1024-1034 CA.

[34]Sec. 1029(2) CA.

[35]Sec. 1032(1) CA.

[36]Sec. 1030(4) CA, cf. the exceptions in sec. 1030(5) CA.

Characteristics

The second approach deals with issues concerning the company's loss of legal existence from an entirely different perspective than for individuals. For this approach, it is characteristic to reject any analogy between the succession to an individual and the cessation of the company's existence and to seek a solution to the problem of terminating the company's activity, taking into consideration the specificities of companies as legal entities. These models are derived from the theory of the company as a special-purpose asset or as a "subject of attribution".

German Model

The predominant view in German doctrine and case law explicitly links the company's existence to the existence of its assets, and therefore, some features of the theory of the legal person as a special-purpose asset can be discerned[37]. The prevailing view on the question of the cessation of the company's legal existence differs in detail depending on whether the company in question is a limited liability company (*Gesellschaft mit beschränkter Haftung*; GmbH) or a joint-stock company (*Aktiengesellschaft*; AG). In essence, however, the results of the views taken are similar. They boil down to the fact that striking off a company from the register does not always result in the company definitively ceasing to be a subject of rights and obligations. For this to happen, it is necessary, in addition to striking off the register itself, that the company no longer has any assets[38]. As a result, striking off the company from the register in some cases is not even of a declaratory nature (if there are assets), but in others, it is of a constitutive nature[39]. Thus, the mere absence of the company's assets does not deprive the company of its legal subjectivity. Because of two requirements which must be met jointly for a company to lose its legal subjectivity (lack of assets and striking off the register), this theory is called the double fact (*Doppeltatbestand*) theory[40]. The existence of

[37]Cf. Schmidt (1989) at 106, 122.

[38]The basis for this conclusion is § 66(5) of the Limited Liability Companies Act of 20 April 1892 (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung*; GmbHG), as well as § 273(4) of the Stock Corporation Act of 6 September 1965 (*Aktiengesetz*; AktG). The latter section provides for the so-called *Nachtragsliquidation* (supplementary liquidation) in cases when further liquidation measures are necessary after the company has been struck off the register. The court shall reappoint the previous liquidators or appoint other liquidators for that purpose. This also applies *mutatis mutandis* to GmbH.

[39]In the case of a GmbH, the dominant view is that the company is still a legal person after striking off the register and is still a GmbH, only dissolved and in the liquidation phase (Berner (2022) § 60, marginal nos. 40-41), while with regard to AG, the view prevails that, once struck off, the company loses its legal personality and is no longer an AG but it becomes a „post-company" (*Nachgesellschaft*), a sub-type of AG, retaining its legal subjectivity, analogous to the „pre-company" (*Vorgesellschaft*) prior to its registration. See, *inter alia*, Bachmann (2024) § 262, marginal nos. 92-94; cf. H. Schmidt (1989) at 138-139, 170-171; about the concept of the *Nachgesellschaft* Lindacher (1995) at 553-556.

[40]Today it is supported by the majority of doctrine (see, among others, Bork (1991) at 844; Berner (2022) § 60, marginal nos. 40-41 and further literature referenced there), as well as case law (see, *e.g.*, decision of the German Federal Tribunal (*Bundesgerichtshof*; BGH) of 20 May 2015, VII ZB 53/13, *Neue Juristische Wochenschrft* 2015, at 2424; decision of the *Oberlandesgericht* in Celle

the company's assets after striking it off the register justifies the continued existence of the company as a legal entity, although at this stage, the purpose of the company's existence is only to terminate its legal relations and liquidate the remaining assets.

In its original form, the *Doppeltatbestand* theory did not consider relevant for the company's continued existence as a legal entity, either the ongoing existence of the company's unsatisfied liabilities or other third-party interests not necessarily related to its assets. However, practice soon showed that the need for the company to continue to exist because of its assets was only a part of a more complex problem. Disposing of the remaining assets is not the only thing that may need to be done by the company after striking off the register[41]. After all, liquidation proceedings also are not just about cashing out assets. There may also be a need to conclude other matters involving the company (*e.g.*, issuing an employment certificate to a former employee). This has given rise to the concept of the extended (*erweitertes*) *Doppeltatbestand*, which today is predominant and which assumes the continued existence of the company also in other situations where, after striking off the register, the need arises for further liquidation measures, not necessarily directly related to the company's assets[42].

The development of the concept thus goes in the direction of viewing the company not exclusively through the prism of its assets serving a specific purpose, but to a certain extent also as a "point of attachment", allocation subject (*Zuordnungssubjekt*) of legal relations not directly related to the assets[43]. Still, it is submitted, however, that the continued existence of the company's unsatisfied claims does not in itself justify the continuation of the legal subjectivity of a company that no longer has any assets and has been struck off the register[44].

The model adopted in Germany could be criticised for paying too little attention to the issue of legal certainty, which is better provided by anthropomorphising approach. Indeed, it is very difficult here to indicate whether a company struck off the register is still a legal entity and, if not, when it ceased to exist. On the other hand, however, it is questionable whether the need to precisely determine the point in time when the company "dies" is necessary in this model. It can be argued that this model (especially the *erweiterter Doppeltatbestand*) provides relative certainty that whenever the company's continued existence as a legal entity is needed, its existence will be assumed even after striking off the register. From the creditors' point of view, it does not seem to change much whether (and possibly when) the legal existence of the company has ceased. If they only point to the assets left behind by the company, this will mean that it has not ceased. German model offers, therefore, a pragmatic solution and maintains the legal existence of the company where necessary – wherever this serves a specific purpose.

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of 3 January 2008, 9 W124/07, *Neue Zeitschrift für Gesellschaftsrecht* 2008, at 271; judgment of the *Oberlandesgericht* in Düsseldorf of 14 November 2003, 16 U 95/98, *Neue Zeitschrift für Gesellschaftsrecht* 2004, at 916).

[41]Schmidt (1989) at 110-111, 122-129, 137, 184.

[42]Bork (1991) at 845; Berner (2022) § 60, marginal nos. 45-59 along with dissenting opinions reported there.

[43]Schmidt (1989) at 138.

[44]Berner (2022) § 60, marginal no 59.

The solution adopted in Germany considers the shareholders' interests and respects the limitation of their liability for the company's obligations. Against this model, it can be argued that, like the Polish one, it insufficiently takes into account the principle that after the company's dissolution, its assets serve first to satisfy the company's creditors. The distribution to the shareholders of the assets remaining after liquidation is not permitted before the company's known debts have been paid or secured and before one year has elapsed from the date on which the summons addressed to the creditors was published[45]. The debts known to the company and reported within this period must be paid or secured. The liquidators are liable to the company for damages for breaches of these regulations[46]. However, if no violations have occurred, the shareholders are not liable to the creditors with the liquidation quota received. The so-called late creditors, including those whose claims only came to light later (*e.g.*, from tortious acts) or even arose later, can count on satisfaction only to the extent that some of the company's assets still remain undistributed to the shareholders[47].

Nevertheless, striking off a company from the register does not prevent creditors from pursuing their claims against the company since, as long as its assets remain, the company still retains its existence as a legal entity. Striking off the register during the course of the court proceedings does not lead to the discontinuance of the proceedings or to the substitution of a legal successor. Only the rules on the representation of the company change[48]. The same objective that the fully anthropomorphising models achieve through universal succession, the German model achieves through the assumption of the continued legal subjectivity of the company.

Adopting this model, on the other hand, may raise serious doubts as to whether the creditors of a company that has been struck off the register and its remaining assets are unknown can exercise accessory security rights established to secure their claims against the company. Again, in German law, it is pragmatically assumed that they can[49]. Dogmatic justification for this position is more complex

[45]§ 65(2) and § 73(1) GmbHG; § 267 and § 272(1) AktG.

[46]§ 73(3) GmbHG. The prevailing view grants the creditors of the GmbH the right to directly claim compensation from the liquidators in their own name and on their own behalf if the creditors cannot obtain compensation from the company and the company does not pursue claims against the liquidators (§ 93(5) AktG and § 268(2) AktG applied accordingly). See, *inter alia*, Altmeppen (2023) § 73, marginal no 21; Büteröwe (2024) § 73, marginal no 14. On the other hand, the creditors are denied the right to directly pursue claims against shareholders who, due to a violation of § 73(1)-(2) GmbHG, have obtained excessive liquidation quota at the expense of unsatisfied creditors (H.-F. Müller (2022) § 73, marginal no 55; Müller (2023) § 73, marginal nos. 59-60). The liquidators who satisfied these creditors are, however, granted a recourse claim against the shareholders - Müller (2022) § 73, marginal nos. 57-60). It is therefore the GmbH shareholders who ultimately bear the burden of satisfying the creditors with the liquidation quota they have received due to the violation of § 73(1)-(2) GmbHG, although the road to this result is long.

[47]Altmeppen (2023) § 73, marginal no 34; Müller (2023) § 73, marginal no 32; Büteröwe (2024) § 73, marginal no 11.

[48]Bork (1991) at 846-850; Schmidt (1995) at 759.

[49]Altmeppen (2023) § 73, marginal no 34; Berner (2022) § 60, marginal no 192; Haas (2022) § 74, marginal no 16 and § 77, marginal no 16; in the case law see BGH's judgments: of 25

though. Concerning suretyship, it is assumed that the guarantor's debt remains despite the principal debt's expiry and becomes an independent obligation. In order to justify the breach of the accessory nature of suretyship, an argument is built up that in this case, the principle of accessory liability is limited by the purpose of the security expressed in the contract of suretyship itself[50], so this limitation of accessory liability is supposed to result from the agreement of the parties to the suretyship contract. With respect to accessory security rights, linking the continued existence of the company's legal subjectivity to the existence of its assets is therefore problematic. It forces to adopt new concepts of security rights, which, in such a case, change their nature – they transform from accessory to non-accessory rights.

French Model

A model that rejects the anthropomorphising approach and focuses on the specificity of the company as a legal subject has also been adopted in France[51]. It differs from the German model in certain respects and appears much simpler. With regard to the cessation of the company's legal existence, the provisions of the French *Code du Commerce* only provide that the legal personality of the company continues until the "closure of the liquidation"[52]. This provision allows considerable room for interpretation, because the "closure of liquidation" can be understood in a broad sense: if there is still a need to take action to terminate the company's activity, the liquidation is not yet completed, and, since this is the case, it is still necessary to maintain the company's legal personality for the purposes of the liquidation, so the company is still the subject of rights and obligations[53]. This is the direction taken by the French *Cour de Cassation* (CdC), which accepts that even the formal termination of the liquidation with the subsequent striking off of the company from the register does not necessarily result in the cessation of the legal personality of the company at the moment it is removed from the register. CdC considers that this legal personality continues as long as the company has rights or debts (liabilities) that have not yet been liquidated. This case law has been well-established for almost 50 years[54].

According to CdC, what may exclude the assumption that a company has lost its legal existence with striking off the register is also the very existence of its unsettled obligations (debts). The most recent ruling in which the CdC reiterated

November 1981, VIII ZR 299/80, *Neue Juristische Wochenschrft* 1982, 875 and of 28 January 2003, XI ZR 243/02, *Deutsches Steuerrecht* 2003, 845 (both relating to suretyship).

[50]Stadler (2023) § 767, marginal no 9.

[51]Cf. the remarks of Arrighi (2016) at 29.

[52]*Code de Commerce*, art. L237-2 sec. 2.

[53]Cf. Arrighi (2016) at 26.

[54]See judgments of CdC, Commercial Chamber: of 30 May 1978, no 76-14.690, *Bulletin des arrêts Cour de Cassation Chambre commerciale* no 156, p. 133; of 2.05.1985, no 83-17409, *Bulletin* 1985 IV no 139 p. 120; of 26.11.2003, no 99-21076, Legifrance; of 7 April 2010, no 09-14671, Legifrance; of 2 November 2011, no 10-25130, *Bulletin* 2011, IV, no 175; of 18 December 2012, no 12-10136, Legifrance; as well as the most recent judgment of 20 September 2023, no 21-14.252 22-21.718, ECLI:FR:CCASS:2023:CO00577 (with approving comment of Barbièri (2023). See also Germain (2002) at 96; Merle (2007) at 152.

this position dates from 20 September 2023 and concerns a tenant company that was struck off the register, after which its creditor (the landlord) sued it for payment of outstanding rent. CdC accepted that the company could still be sued because, since there is an unfinished business, it means that the liquidation has not been completed and thus the company has not lost its legal subjectivity[55]. In such cases, the court must appoint an *ad hoc* representative to represent the company because once the company was struck off the register, the liquidator lost the power to represent the company[56].

There is a perceptible difference here from the German approach. According to the German *Lehre vom Doppeltatbestand*, a company generally exists despite being struck off as long as it has assets. Debts alone do not prevent the loss of the company's legal existence. If a company struck off from the register has no assets, it loses its legal existence and can no longer be a debtor, even if there are remaining unsatisfied creditors. It can thus be seen that the solution adopted in France perceives the company to a far greater extent through the prism of the legal person as the "centre of attribution" of legal relations of various kinds, attaching little importance to the asset substrate as prejudging the legal existence of the company. Apart from this difference, the company's legal existence is also maintained in France as long as it is needed. This need is even seen in a wider range of cases than in Germany. Once the company has finally lost its legal existence (although it is sometimes difficult to determine when this has occurred), there is no need to identify an entity to "inherit" rights and obligations from the company, as these no longer exist.

Under French law, the creditors' interest is further protected by the possibility to address claims directly to the shareholders of the defunct company. After striking off the company from the register, the shareholders are liable to the company's creditors up to the amount of their contributions and liquidation quota received[57]. Moreover, in the light of the position of CdC accepting the continued existence of the company where this is needed to satisfy its debts, it is also possible to justify dogmatically the view allowing the creditors to exercise accessory securities (*e.g.*, suretyship) established to secure creditor's claim against the defunct company.

[55]Judgment of CdC of 20 September 2023, no 21-14.252 22-21.718, cit.
[56]Germain (2002) at 96; Merle (2007) at 152. Such a conclusion also follows from the cited judgment of CdC of 20 September 2023 no 21-14.252 22-21.718.
[57]Germain (2002) at 99; Merle (2007) at 154.

Spanish Model

Despite the difference of opinions in the doctrine[58] and the initially divergent approach of the jurisprudence, Spanish law now seems to be moving in the same direction as French jurisprudence, thanks to the plenary decision of the *Tribunal Supremo* (TS) of 24 May 2017 (324/2017)[59], unifying the doctrine of the Civil Chamber regarding the legal capacity of companies that have been dissolved, liquidated and struck off the register. TS accepted that "although the registration of the deed of extinction and the cancellation of all the registry entries of the extinguished company entails, in principle, the loss of its legal personality, since it cannot operate in the market as such, it retains this personality with respect to claims pending based on supervening liabilities, which should have formed part of the liquidation operations. For these purposes, related to the company's liquidation, it continues to have personality and, therefore, the capacity to be a defendant"[60]. Once struck off the register, however, the company's purpose is merely to deal with unfinished legal relationships. As the liquidation is incomplete, the existing liquidators retain their position as the company's representatives[61].

Swiss Model

Finally, the interesting situation of Swiss law is worth mentioning, which does not yet lend itself to a clear classification into models adopting or rejecting anthropomorphising approaches. Swiss law seems to be now at a turning point when it comes to resolving the question of the loss of legal existence of

[58]The amendments introduced by the consolidated text of the *Ley de Sociedades de Capital* (LSC), *Real Decreto Legislativo* 1/2010 of 2 July 2010, have not removed the doubts that existed before. Some doctrine takes the view that the company terminates definitively without a successor; another view is that the Spanish legislator's aim was to adopt the Italian model of the shareholder succession (the views presented in the literature are summarised by Recalde Castells & Martínez Flórez (2018) at 536-538). Indeed, like the Italian CC, the LSC provides that former shareholders are liable to the company's unsatisfied creditors after striking off the company from the register up to the amount of the liquidation quota received (Art. 399(1) LSC). Although unlike Italian CC, the LSC does not explicitly state that the company ceases to exist when struck off the register, the shareholders are referred to in Art. 399(1) LSC as "former" (*antigos*) shareholders. At the same time, however, art. 398(1) LSC stipulates that if, after striking off the company from the register, undistributed assets of the company appear, the liquidator shall carry out a supplementary liquidation and pay the former shareholders additional liquidation quota.

[59]ECLI: ES: TS:2017:1991.

[60]In earlier case law, there was both a position coinciding with this (see TS rulings: no 979/2011 of 27 December 2011 and no 220/2013 of 20 March 2013; see also resolution of the *Dirección General de los Registros y del Notariado* (Directorate General of Registers and Notaries): of 13 May 1992, *Boletín Oficial del Estado* (BOE) no 153 of 26 June 1992, of 13.04.2000, BOE no 139 of 10 June 2000, and of 29 May 2001, BOE no 167 of 13 July 2001), as well as a contrary view, according to which the striking off of a company from the register signifies the moment when it ceases to exist as a legal subject and therefore it is not possible to sue the company unless the company's entry in the register is reinstated (TS ruling no 503/2012 of 25 July 2012, ECLI:ES:TS: 2012:5693).

[61]In this way, with reference to art. 400 LSC, TS ruling no 1991/2017 (324/2017) of 24 May 2017, cit.; see also earlier TS ruling no 9304/2011 of 27 December 2011 (ECLI: ES:TS:2011:9304).

companies, and it is not easy to point to the currently dominant view[62]. Historically, the predominant view was that a company's legal personality ceases definitively upon striking off the register, subject to the court's power to reinstate the company's entry in the register (with *ex nunc* effect only) in the event of the existence of an interest worthy of protection (*schutzwürdiges Interesse*; *un intérêt digne de protection*)[63], but this view gave rise to insoluble problems in determining the status of the company's rights and obligations in the period between striking off and reinstatement in the register[64]. Subsequently, the view began to prevail that the striking off of a company from the register has purely declaratory effects, meaning that the decisive factor is whether the company's liquidation has been entirely and effectively completed[65]. This view makes it much easier to resolve problems arising in the event of the subsequent reinstatement of the company in the register. However, there is also a viewpoint that coincides with the German *Lehre vom Doppeltatbestand*[66]. In the BGE jurisprudence, there are signs of a move in the latter direction[67]. It still seems too early to assess whether this will be a sustainable trend, though[68].

Conclusions

It is true that the history of the existence of legal persons is considerably shorter than the history of succession law. Nevertheless, it is already several centuries old and still, the cessation of the legal existence of legal persons, including companies, and the fate of their legal relations after the termination of their activities are far from developing general principles that would provide a certain direction for the resolution of specific problems that often emerge in practice.

The field of a company's legal relations after the termination of its activities is still evolving in many jurisdictions. Legislators are clearly searching for a solution that will be the right one. Sometimes, they change their minds in the course. Undeniably, practice plays a large role in this process of evolution. It is in practice that it turns out which needs the theoretical constructs should meet. This is well

[62]The views presented in Swiss doctrine and case law are carefully collated by Jung (2013) at 85-90; see also Vischer (2015) at 259 and Gilles (2024) art. 746, marginal no 5.

[63]Currently, the procedure for the reinstatement of the registration of a struck-off company is regulated in art. 935 of the Swiss law on obligations (*Obligationenrecht*; OR). Initially, such a procedure was not provided for at all in Swiss law, and the current regulation is a codification of the *acquis* of case law (see the reasons for the judgment of the Swiss Federal Court, *Bundesgericht* (BGE) of 6 April 2010, 4A_16/2010, sec. 5.1.1, Swisslex).

[64]This is best illustrated by the considerations of Vischer (2015) at 260-261; see also Jung (2013) at 85-90.

[65]This view is joined by Calderan & Geiser (2016) art. 746, marginal no 3; Haberbeck (2017) and Kuster (2023) art. 746, marginal no 2.

[66]Jung (2013) at 90.

[67]See BGE's judgment: of 2 September 1991, 117 III 39, sec. 3b; 4A.12/2006 of 19 September 2006, BGE 132 III 731, sec. 3.1, and of 25 September 2012, 2C_408/2012, sec. 3.1-3.3.

[68]In its judgment of 19 August 2020, 4A_19/2020, Swisslex, BGE had an excellent opportunity to unequivocally prejudge this issue, but did not actually resolve it conclusively.

illustrated in Spanish law, where the legislator may have intended to adopt the Italian model in 2010[69], but the practice seems to indicate that the French model is more suited to the market's needs. The practice also shows that the company's property liability to creditors is not the only reason why it is necessary to maintain the company's legal relations after its deletion from the register. Even if the company no longer has any assets, other unfinished business of the company may still have to be dealt with, such as striking off from the land register some long-expired right that has been entered in favour of the defunct company, or issuing an employment certificate to a former employee.

The anthropomorphising approach does not seem to be a direction that adequately meets the market's needs. In the case of individuals, it is nature that confronts lawyers with a *fait accompli* and necessitates the creation of legal regulations in connection with the definitive and irreversible cessation of legal subjectivity. Nothing of the sort occurs in the case of companies. There is no *fait accompli*. Quite the contrary: the power of decision rests in the hands of the legislator.

One common feature can be seen in all the approaches mentioned above: the recognition of the practical need to maintain a certain "point of attribution" for the company's legal relations, even if it has ceased to exist, for as long as the environment with which the company has entered into legal relations requires it. Addressing this need by ascribing to another entity the role of universal successor to the company seems superfluous and only results from a strong attachment to institutions known from the law of succession. Instead of choosing another entity to take over the function of this "point of attribution" for the company's legal relations, a better solution is to assume that this "point" invariably remains the company itself, even though after the cessation of its activities it functions in a different way – as a special residual legal entity. This solution is simpler. There is still the same subject of the rights and the same debtor to obligations. It also has advantages from the point of view of the accessory liability of third parties for the debts of the extinguished company. These persons can still be liable for the company's debts as those continue to exist.

What legislators should focus on, therefore, is regulating the operation of the company in the residual stage. The issue to be decided is to determine the manner of representation of this entity. The most practical solution would be to appoint a representative (*e.g.*, a liquidator) on an *ad hoc* basis when the need arises rather than assuming that the last representative of the company before the transition to the residual stage retains its position (cf. Spanish law), as it were, a perpetual right of representation. Firstly, this representative may no longer exist when the need arises to act for the company. Secondly, he or she cannot be required to be ready to represent the company indefinitely.

As far as creditors' rights are concerned, the general rules on the prescription of claims or the extinction of specific rights should determine the time horizon over which the creditors can exercise their rights, not the fact that the company has ceased to operate. The rules for asserting rights should be standardised irrespective of whether the other party to the legal relationship operates as a sole trader or in

[69]Cf. fn. 58.

the legal form of a company. Regulations disciplining creditors in the course of liquidation of a company should not change these rules.

At the same time, as long as the legal norms concerning a specific right of the company's creditor allow it to be exercised, there should also be a liability of the shareholders limited in amount to what the shareholder in question received as the liquidation quota. Relieving the shareholders of this liability, as provided, for example, in Polish and German law, is not justified. These sums constitute the residue of the company's assets, which guaranteed the satisfaction of creditors entering into legal relations with the company.

In order to address the question contained in the title of the study, it must be stated that drawing a parallel between the life of a human being and the "life" of a company does not lead to accurate results. In the case of companies, legislators have the power to prejudge that there is no category of "legal relations of companies after the cessation of their legal existence" and to state that it is the existence of these relations that determines the continued legal existence of the company, albeit in an altered legal form.

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Employment Relationship, Emergency Situations, Formal Models of 'Emergency' Labour Law - Outline of Main Issues[1]

*By Eliza Maniewska**

The study presented in the paper is concerned with a formal (theoretical and legal) model of regulations dedicated to the normalisation of employment relationships in emergency situations (states). By an 'emergency situation' the authoress means 'overall exceptional circumstances caused by special, rare events, unforeseen in an accepted time perspective, in which someone or something was (is) at a certain time'. Until the outbreak of Covid-19, the subject matter of legal regulation of employment relationships in connection with the occurrence of emergency situations has not been given much thought (in our legal circle). This is also relevant to emergencies other than epidemics (warfare, natural disasters, force majeure, etc.). Insofar as research has been conducted to date, it rather focused on substantive and legal aspects of the regulations implemented in connection with the occurrence of such events, while any broader reflection on their formal and legal model has not been conducted. For this reason, in this paper, the authoress has firstly advanced a thesis that a distinction needs to be made between substantive and formal and legal models for the regulation of employment relationships in emergency situations, and secondly an attempt has been made to answer the question of which formal models can be distinguished in this context, what criteria should be used in this endeavour and how, on this basis, the distinguished models should be assessed. The authoress puts forward a thesis that formal models of 'emergency' labour law are closely linked to the concern to uphold the elementary democratic standards which should be respected by the law regardless of whether it relates to 'ordinary' or extraordinary situations. The research is primarily based on an analytical and linguistic, analytical and logical, dogmatic and legal, and descriptive method. It is conducted mainly on the example of the regulations of the Polish law and the decision of the Polish legislator taken in connection with the Covid-19 outbreak in relation to the method for the regulation of employment relationships during the period covered by it. However, the context of international (convention) regulations is also referred to. The authoress proposes to distinguish three basic formal models for the regulation of employment relationships in emergency situations: the permanent model, the mixed model and the ad hoc model. She concludes that, taking into account both the need for a relative flexibility in legal regulation and the need to maintain the elementary standards of a democratic state of law (primarily a guarantee that the applied legal solutions can be subjected to social discussion and dialogue between social partners), the mixed model should be considered as the most optimal.

Keywords: *Formal model of 'emergency' law; Emergency state; Emergency situation; 'Emergency' labour law; Employer's risk*

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Introduction

Undoubtedly, the COVID-19 epidemic has contributed to a revision and led to the need for a new perspective of factual conditions of employment and legal conditions related to it, which have an impact on the (legal) situation of the parties to an employment relationship. However, at the same time, the development has highlighted, or even gave rise to the need to address this issue in a much broader context, that is the context which encompasses all kinds of other emergency situations, including warfare, natural disasters, force majeure, etc. This need has been reinforced by the current emergence of an armed conflict in Europe (war in Ukraine), which could still develop into a wider one.

This has raised a number of important research issues that have not been addressed so far, or have been addressed only to a narrow extent. Among them, the following can for example be mentioned: indicating axiological grounds for the modification of the regulations regarding employment relationships in connection with the occurrence of emergency situations; answering the questions whether, and within what limits, deviations from the principles that shape these relationships in normal conditions are permissible in such situations and what factors should be taken into account in determining the final shape of individual legal institutions (their legal and extra-legal determinants).[2] Nevertheless, the choice of the method of regulation that would best suit this type of matter is an essential issue (the administrative-law or private-law method). It seems that it is indispensable to carry out a broader reflection, which will focus on an assessment as whether the regulations and models that have been developed for situations relating to an economic crisis, in which case we have more experience, are adequate to the situations referred to above.

However, the matter of the theoretical and legal model of regulations dedicated to the normalisation of employment relations in such conditions is also relevant. In particular, the question is whether, in this case, the legislator should rely on *ad hoc* measures or whether it should have at least some framework of adequate regulations prepared and adopted in stable times, i.e. the times in which all democratic mechanisms should be in place and in which a relative space for a full realisation of the idea of social dialogue exists. This article is concerned with this very issue precisely.[3]

Research Context

The concept of an emergency situation is relational it its nature, as its content is shaped in opposition to the content of the concept of ordinary (usual) situation. Such interdependence can be found in the colloquial language, but also translates into legal language and the language of the law.

In colloquial terms, an ‘ordinary situation’ is usually understood to mean ‘overall ordinary, normal circumstances which are usual and unremarkable’,

[2]See also Fitzpatrick (1994) at 1-2.
[3]See also Ackerman (2004); Bredekamp, Thorson Hause & Bond (1999).

whereas an 'emergency situation' is usually understood to mean 'overall exceptional circumstances caused by special, rare events, unforeseen in an accepted time perspective, in which someone or something was (is) at a certain time'.[4]

Having this in mind, it is also worth initially mention the relevant principles of labour law which will be taken into account as a research background for the reflection on the theoretical and legal model of provisions dedicated to the regulation of employment relationships in emergency situations and the sets of circumstances which we will treat as emergency situations.

In defining this point in more detail, it seems that no special justification is needed for the making an assumption that, in this case, an adequate research context should focus on those features, or principles of labour law, which refer to situations deviating from the 'normal', undisturbed course of 'performance' of the employment relationship, in which the main performances of the parties (equivalent in kind) are: on the part of the employee – the performance of work of a certain type for the benefit of the employer (under the conditions of subordination) and on the part of the employer – the employment of an employee (allowing him or her to perform work) and the payment of remuneration corresponding to the work performed. At the same time, the performances referred to above can be seen as the primary objectives for which the employment relationship was concluded, understood as those which satisfy the main interests of the parties and justify the establishment of an employment relationship.

As a branch of law concerned with social relations of a permanent nature (as a rule), labour law also refers to issues related to the occurrence of certain events that are undesirable from the point of view of attainment of the objectives referred to above, or, more simply, it also refers to situations that hinder or prevent their attainment. The article points out that the following can be the reasons impeding the attainment of the objective of the employment relationship:

1. A personal situation of the employee or the employer;
2. Malfunction of technical equipment enabling the performance of work;
3. Circumstances external to the enterprise, including force majeure;
4. The manner in which the employee performs work; or
5. Changes in the market and the economic situation.

As a rule, the party to the employment relationship who is encumbered with the consequences of occurrence of these (adverse) circumstances is the employer and not the employee. This is always the case when, in general, the employee cannot be blamed for the occurrence of a given circumstance, but, more importantly, also the case when the employer itself had no influence on the occurrence of that circumstance either. The collective name for the legal institutions that address such situations is the 'principle of employer's risk'. In this sense as well the principle of employer's risk, to which the legal character of a

[4]https://dictionary.cambridge.org/pl/dictionary/english/extraordinary
https://dictionary.cambridge.org/pl/dictionary/english/situation
https://dictionary.cambridge.org/pl/dictionary/english/state

descriptive (rather than normative) principle of labour law must be attributed, reflects one of the essential features of the employment relationship.[5]

The above largely reflects the classic division of the employer's risk into economic, technical/organisational, social and personnel risks.

Highlighting this fact has a key impact on the formulation of the essential aspects of yet another division of the employer's risk, as it is presented not so much through the prism of material criteria (facts), but through the prism of formal criteria (conventions). Namely, it is about distinguishing between the forms of risk such as: factual risk and legal and normative risk.

The distinction essentially highlights the difference between the occurrence of a circumstance that is undesirable from the point of view of attainment of the objectives of the employment relationship (factual risk) and the conventional consequences of its occurrence: the possibility that a specific legal obligation may arise in relation to such occurrence on the part of some legal entity or the loss of a right by that entity (legal risk) and the attribution by the law, to a specific entity, of an obligation connected with the occurrence of that circumstance or loss of a right (normative risk). For example:

1. The occurrence of a factual circumstance that is undesirable from the point of view of attainment of the objectives of the employment relationship, such as an employee's illness (factual risk);
2. Leads to the possibility that legal provision may designate the entities (entity) which are to bear the negative consequences of occurrence of this circumstance through imposing on them a certain obligation or depriving them of a certain right (legal risk) – potentially, it may be the employee, the employer, or the public entity;
3. Legal provisions designate the entities (entity), which are to bear these consequences and indicate a specific legal obligation which is assigned to them or the scope of the lost right (normative risk).

For example, pursuant to the regulations of the Polish Labour Code and the social insurance system in Poland, during the period of an employee's incapacity to work due to illness (actual risk) not exceeding 33 days in a calendar year, the employer is obliged to pay the employee the so-called sick leave pay amounting to 80% of his or her normal earnings (as a rule); as a result, the employee 'shares' the normative risk of illness with the employer during that period by losing 20% of his or her income from the employment relationship; the public institution (the Social Insurance Institution) takes over the obligation to provide funds to the sick leave employee (normative risk) only after the expiry of the period provided for the payment of the sick leave pay by the employer, i.e., as a rule, only from the 34th day in a given calendar year. In this case, the legal risk is that each of the three entities mentioned here could potentially (and therefore not necessarily) be encumbered with the associated 'costs' as imposed by law.

It is this type of risk that will be crucial for further considerations.

[5]See more broadly Nassauer (1978).

Assuming that the reasons listed so far and impeding the attainment of the objectives of the employment relationship (personal situation of the employee or employer; technical failures; circumstances external to the company, including foreseeable force majeure; changes in the market and economic situation) fall within the spectrum of ordinary situations, the question is whether and which emergency situations allow for a different distribution of contractual risk in the employment relationship and in which formal framework they are to be specified and possible deviations from the rules applicable to "ordinary" situations are to be defined in connection with their occurrence.

For the purposes of further considerations, this will be referred to collectively as the formal model of 'emergency' employment law.

Formal Models of 'Emergency' Law

Trying to clarify (specify in more detail), on the basis of the above analysis, the meaning of the notion of emergency situation in the language which is to be used to describe the law (i.e. in legal language) or the notion of a state of emergency, which is identical in meaning in everyday language, it is obvious that the legal language cannot abstract from the relevant normative environment. This means that the dictionary-based understanding of an emergency situation (state of emergency) referred to above must first of all be compared with the concept of emergency situation as it functions in the legal language. In doing so, it should be borne in mind that it can and is used in legal texts of different rank and scope, and that it is sometimes used interchangeably with other terms such as state of emergency, force majeure, state of necessity, etc.

For example, in the Polish Constitution, which introduced the concept of a state of emergency (which includes: the martial law, the state of emergency and the state of natural disaster), it covers situations such as: external threats to the state; armed aggression against the state; joint defence of the state (with other states) against aggression under international agreements; threats to the constitutional system of the state; threats to the security of citizens; threats to public order; natural disasters and technical failures having the features of a natural disaster (Article 232 of the Constitution of the Republic of Poland).

Further (subject to meeting subsequent requirements set out in Constitution), the occurrence of these circumstances translates into the legislative authority's power to an ordinary application of a legal regime in which certain constitutional principles, rights and freedoms are excluded, and thus it translates into a right to introduce a regime of 'emergency' legislation that may contain deviations from ordinary legal rules even so far-reaching as to exclude normally applicable (broadly understood) constitutional guarantees.

In the Polish legal system, these are the Acts of 2002: the Martial Law, the State of Emergency Law and the State of Natural Disaster Law. At the same time, Article 233(1) and (2) of the Polish Constitution states that a statute defining the scope of restrictions on human and civil liberties and rights during martial law and the state of emergency may contain any modification of the normal legal regime,

as long as it does not restrict the freedoms and rights set out in Article 30 (human dignity), Article 34 and Article 36 (citizenship), Article 38 (protection of life), Article 39, Article 40 and Article 41(4) (humane treatment), Article 42 (criminal liability), Article 45 (access to the courts), Article 47 (personal rights), Article 53 (conscience and religion), Article 63 (petitions) and Articles 48 and 72 (family and child) and provided that the human and civil liberties and rights have not been restricted solely on the basis of race, sex, language, religion or lack thereof, social origin, birth and property.

In contrast, a different mechanism has been applied to emergencies covered by states of natural disaster. In such a case, as opposed to martial law and the state of emergency, the Polish Constitution explicitly specifies those areas in which the ordinary constitutional order may be interfered with. The provision (Article 233(3)) clearly stipulates that, in a state of natural disaster, the freedoms and rights set out in Article 22 (freedom of economic activity), Article 41(1, 3 and 5) (personal freedom), Article 50 (inviolability of home), Article 52(1) (freedom of movement and residence on the territory of the Republic of Poland), Article 59(3) (right to strike), Article 64 (right to property), Article 65(1) (freedom to work), Article 66(1) (right to safe and healthy working conditions), and Article 66(2) (right to rest) may be limited.[6]

On the other hand, for example, ILO Convention No. 29 on forced or compulsory labour[7] treats the following cases as emergency situations (force majeure incidents) giving right to a departure from the principle of freedom of work: war, disasters or threats of disasters such as fires, floods, famines, earthquakes, violent epidemics and cattle diseases, invasions by animals, insects or harmful plant parasites, and in general any circumstance posing a danger or risk of danger to the life or normal existence of the general population or a certain section of the population.

In contrast, in accordance with Article 16 of the European Convention on Human Rights[8], measures can be taken to repeal the application of obligations under the Convention to war or other public danger threatening the life of the nation.[9]

These examples alone show that the attribution to a given situation of 'extraordinariness' that allows such a situation 'to be treated' differently in legal terms is not straightforward. However, the present research does not seek to identify the substantive (essential) feature of 'extraordinariness' in the context of labour law, but only to demonstrate that this issue can also be debatable.

The examples referred to above also show that the legislator makes decisions and may make decisions also as to which specific solutions modifying the 'ordinary' legal regime will be introduced in these situations.

All this gives rise to the thesis of a possible differentiation of formal models of 'emergency' labour law.

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[6]See also Golia, Hering, Moser & Sparks (2020).

[7]International Labour Organisation Convention No. 29 concerning Forced or Compulsory Labour adopted at Geneva on 28 June 1930.

[8]Convention on Human Rights, done at Rome on 4 November 1950.

[9]See also Sottiaux (2018) at 1063; Svensson-McCarthy (1998); Oraa (1992).

Types of Formal Models of 'Emergency' Law

First, it should be emphasised once again that, by referring to the formal model of 'emergency' law, we abstract from its substantive 'content', i.e. from what we used to call the content of the law, in this case understood as a set of specific legal solutions adopted in connection with the occurrence of a given extraordinary situation.[10]

Moreover, it should be noted that the observation of the 'behaviour' of the Polish legislator in connection with the occurrence of the Covid-19 pandemic provided a certain stimulus for the reflection on a possible typology of these formal models of 'emergency' law and, most importantly, the criteria according to which this could be done. This does not mean, however, that its conclusions cannot apply to emergencies other than a pandemic (epidemic) affecting the possibility of attainment of the objectives of the employment relationship or, more precisely, making such attainment difficult or even impossible.

The purpose is to highlight and demonstrate the differences between such model formal solutions, which I refer to as: the permanent model; the mixed model and the *ad hoc* model.

In the permanent model, firstly, a catalogue of emergency situations is predefined and, moreover, the manner in which the occurrence of these situations will modify the content of the legal relationship as defined in 'ordinary' law is predetermined.

In the mixed model, only the boundary conditions of both the assessment of 'extraordinariness' of a situation and the permissible framework of modifications of the content of legal relationships as defined in 'ordinary' law are pre-defined.

Then, in the *ad hoc* model, the legislator determines all these elements only in connection with the occurrence of a specific situation and only on the basis of current observation it assess its 'extraordinariness' and, at the same time, selects (creates, introduces) such legal solutions, which it views as desirable at a given moment (which obviously is also dependent on the 'dynamics' of the existing situation).[11]

The observation of the moves made by the Polish legislator in connection with the crisis of the Covid-19 pandemic and the lively social and political debate that arose following these moves allowed to draw preliminary conclusions relating to the assessment of the models defined in this way, taking into account their functionality, effectiveness and the degree in which they respect universal values which at the same time cannot be excluded in any situation and which the law should enshrine.

Consequently, given that any law should only provide for solutions that comply with the principle of proportionality in a broad sense, this should be considered extremely difficult, if not impossible, in the permanent model. In the event of occurrence of emergency situations that inherently represent a certain degree of unpredictability (both in terms of scale and in terms of the actual course of events), the principle of proportionality in the broad sense imposes the adoption

[10]See also Fatovic & Kleinerman (2013); Feldman (2010) at 163-164.
[11]See also Dyzenhaus (2005) at 2012-2015.

of such solutions (models) which feature a certain element of flexibility. This enables (as far as possible) to modify the 'corset' of legal provisions in such a way that, in the event of occurrence of situations significantly changing the circumstances in which the addressees of the law function, they still have the feeling that the law provides for fair solutions (in accordance with the principles of social justice on at least an elementary level).

From the axiological perspective, the *ad hoc* model should be treated with far-reaching caution. It is because we risk in this case the exclusion of the democratic mechanism associated with social dialogue (social and political discussion). In a democratic state, they should take place before, and not after, the legal amendments modifying the 'ordinary state of affairs', especially if these changes are significant. Democracy requires that all issues that are important to the situation of the subjects of the law (citizens, social partners and other stakeholders) be submitted to discussion, as far as possible; and this has no place in what is referred to as the *ad hoc* model. Indeed, the extent of flexibility of this mode leads to a situation where the law is changed on an ad hoc basis almost overnight, and such an approach further increases the risk of mistakes being made and provides a potentially large scope for abuse. Solutions which, at a given moment of time, seem good, functional and effective may ultimately prove to be flawed or even harmful in the long term. The public discussion, which is required by the democratic standard, should also take place in the time and under the conditions of relative calm, and not in an extraordinary atmosphere and under extraordinary circumstances.

From the point of view of the need to implement these values, a mixed model seems to be the most optimal. On the one hand, it meets the obvious need for flexibility in the way in which the legislator reacts to the occurrence of emergency situations and, at the same time, it allows only such a 'correction' of the law which (as a rule) has gained relative acceptance of its addressees, while, on the other hand, it brings a greater or lesser degree of flexibility indispensable for the introduction of extraordinary solutions, taking into account the need for their functionality and effectiveness.

The latter, i.e. functionality and effectiveness, should be assessed from the point of view of the primary reason for which 'extraordinary' solutions are allowed and introduced. It is the restoration of the 'normal' state of affairs – and thus the possibility of returning to 'ordinary law' ('everyday law').

Formal Model of 'Emergency' Labour Law adopted in Poland in connection with the Covid-19 Outbreak

The concept of the formal model of 'emergency' law outlined above and the proposed typology of such models and their framework assessment can be illustrated by a comparison with the actual normative context of 'emergency' labour law set by the legal solutions adopted in Poland in connection with the emergency situation that was the Covid-19 epidemic.

This context will be presented in the research area specified earlier. It is about the distribution of risk in the employment relationship, where the inability to perform work is directly caused by epidemic restrictions imposed by the legislator, such as an order for a healthy employee to stay in home isolation or quarantine, a ban on certain types of economic activity, or a ban on leaving the place of residence, etc.[12]

Furthermore, this context (to better illustrate the findings made) will be limited only to the formal model of 'emergency' labour law adopted by the Polish legislator with regard to the distribution of wage risk.

Consequently, it should be pointed out that, although the mixed model could be used within the Polish legal system, the legislator decided to use *an ad hoc* model. Indeed, it introduced an incidental temporary regulation, which in principle does not use any elements of the permanent model. These are the statutes that are commonly referred to as anti-covid shields, which for the duration of the epidemic, introduced solutions that reduce (mitigate) the effects (costs incurred by employers) resulting from the distribution of wage risks existing in 'ordinary' labour law, but do not change the distribution of these risks in principle.

In fact, the legislator did not decide to solve this issue within the framework of a mixed model, which could have been used after a political decision was taken to declare a state of natural disaster within the meaning of Articles 232 and 233(3) of the Polish Constitution, and thus giving constitutional legitimacy to the change of the legal regime and the application of the solutions provided for in the statutes of 2002 and compatible with the Constitution: in the Act on the State of Natural Disaster and in the Act on the Compensation of Property Losses Resulting from the Restriction of Human and Civil Liberties and Rights during the State of Emergency.

With the adoption of the mixed model of 'emergency' labour law as referred to above, anyone who suffered a property loss as a consequence of the restriction of human and civil liberties and rights during such a state, and therefore also the employer who was obliged to pay downtime wages to the employee, would be entitled to a claim against the State Treasury for compensation of the property loss so caused. In such a system, the wage risk associated with downtime that does not result from the fault of either party to the employment relationship would be assumed by a public institution (the State).

Instead of adopting the mixed model, i.e. the 'permanent' regulation contained in the 1997 Constitution of the Republic of Poland supplemented by the "permanent' laws of ordinary legislation implementing it, which could be further supplemented by additional incidental (temporary) regulations within the framework provided for therein, a regulation was applied which consisted in:

1. granting financial assistance in an *ad hoc* fixed amount;
2. only to certain employers, also selected on an *ad hoc* basis;
3. when they fulfil certain (also *ad hoc*) conditions.

[12]See Bosek (2022) at 2.

In parallel to these solutions, the possibility of mitigating the adverse effects of the situation on employers has been provided, including by allowing collective agreements limiting or modifying certain labour rights, which in practice have most often been imposed or forced on social partners by employers.

This was accompanied by certain reactions voiced in occasional and current public discourse: uncertainty as to whether, and if so what, solutions will be introduced by the legislator to deal with the situation; the feeling (caused by the short time perspective) that the solutions introduced have not been thought through; the feeling of inadequacy of some of them and the difficulties arising in their application in practice, revealing the non-functionality and sometimes even the ineffectiveness of the implemented measures. There were also many other minor comments.

Summary

In the summary, it is nevertheless worth highlighting another general yet extremely significant conclusion.

The point is that the research carried out so far inevitably seems to bring out the need for a scientific reflection on the labour law, also in the area of the function of that law, which should be directed at reducing uncertainty.

By this uncertainty I mean the lack of predictability of legal solutions that may be applied in connection with a possible occurrence of emergency situations that require the application of extraordinary solutions in relation to such a sensitive sphere as the acquisition of income through or by means of human work (which affects both the employer and the employee). The scale of this uncertainty increases as the likelihood of emergency situations increases, and these (as studies shows) are beginning to affect humanity with increasing frequency.

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Hungarian Model of the Restructuring Process - National Report

*By Noémi Suri**

As a result of the transposition obligation in Article 34 of Directive (EU) 2019/ 1023 of the European Parliament and of the Council on restructuring frameworks and insolvency, Act LXIV of 2021 (hereinafter - referred to as the Restructuring Act) on restructuring and the amendment of certain acts with the purpose of legal harmonisation was promulgated on 3 June 2021, effective as of of 1 July 2022 for any legal persons struggling with financial difficulties not yet insolvent. The creation of a restructuring model prescribed by the EU directive was implemented by the Hungarian legislator through the opening of a non-contentious court procedure ordered within the jurisdiction and exclusive competence of the Metropolitan Court of Budapest. The primary aim of this paper is to develop a complex and comprehensive picture of the restructuring procedure as placed within the system of insolvency and reorganisation procedures in Hungary. Firstly, the paper showcases the unified EU objectives set out by the directive within the system of European insolvency procedures. Secondly, it describes the Hungarian procedural rules and the most important related legal institutions adopted to implement these objectives. Section 6 of the Restructuring Act sets out that the aim of restructuring is to adopt and implement a restructuring plan with some or all of the creditors and thus prevent the debtor's future insolvency and ensure the debtor's financial viability. For the purpose of reaching this objective, therefore, restructuring constitutes measures aiming at restoring the financial balance of the debtor, including changing the composition, the conditions or the structure of the debtor's assets and liabilities and any other part of the debtor's capital structure. Among these measures, the Restructuring Act lists as example the sale of the debtor's property or part thereof, or the sale of any participation in the debt. The condition for restructuring is the likelihood of the company's insolvency. The definition of the likelihood of insolvent Directive (EU) on restructuring frameworks and insolvency, European insolvency procedures, insolvency and reorganisation procedures, restructuring plan, non-contentious court procedure bears a central significance here: it constitutes the entrance point into the restructuring procedure.[1] In addition to the definition of insolvency, Section 2(2) of the Restructuring and Insolvency Directive renders the interpretation of the probability of insolvency into Member State jurisdiction. Among the Explanatory notes the Restructuring Act defines the likelihood of becoming insolvent as a situation in which there are reasonable grounds for believing that the debtor will be unable to meet his/her outstanding payment obligations when they fall due, unless further measures are taken.

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[1]Fabók (2020) in Bodzási at 153.

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Introduction

As a result of the transposition obligation in Article 34 of Directive (EU) 2019/1023 of the European Parliament and of the Council on restructuring frameworks and insolvency[2], Act LXIV of 2021 on restructuring and the amendment of certain acts with the purpose of legal harmonisation[3] was promulgated on 3 June 2021, applicable as of 1 July 2022 for any legal persons struggling with financial difficulties not yet insolvent.

The creation of a restructuring model prescribed by the EU directive was implemented by the Hungarian Legislature through the opening of a non-contentious court procedure ordered within the jurisdiction and exclusive competence of the Metropolitan Court of Budapest. The primary aim of this presentation is to develop a complex and comprehensive picture of the restructuring procedure as placed within the system of insolvency and reorganisation procedures in Hungary.

Firstly, the presentation showcases the unified EU objectives set out by the directive within the system of European insolvency procedures. Secondly, it describes the Hungarian procedural rules and the most important related legal institutions adopted to implement these objectives.

The Purpose and Objective of the Directive in the System of European Insolvency Law

Before discussing the objectives of the Restructuring and Insolvency Directive in detail, it is important to clarify the relationship between and the purpose of the legal sources of insolvency law in the European Union.

Paragraph 51 of the Preamble to the recast regulation on insolvency published[4] in the EU Official Journal on 5 June 2015 defines the effective execution of insolvency proceedings at the different group members involved as the general objective of the legal source. The scope of the European Insolvency Regulation is based on collective proceedings. In the European Insolvency Regulation, Articles 1 and 2 read together, collective proceedings are public proceedings involving all or a significant proportion of the debtor's creditors. The

[2]Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency).

[3]Hereinafter - the *Restructuring Act.*

[4]Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings. Official Journal of the European Communities L 141/19. 5.6.2015 in 'European Insolvency Regulation'.

scope of the Regulation includes procedures to deal with the actual insolvency of a debtor as well as so-called 'impending insolvency'. The scope of the Regulation covers collective actions against a debtor, whether a natural[5] or legal person, a trader or a private individual: a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed, b) it should also extend to proceedings providing for a debt discharge or a debt adjustment in relation to consumers and selfemployed persons, c) procedures which grant a temporary stay on enforcement actions brought by individual creditors where such actions could adversely affect negotiations and hamper the prospects of a restructuring of the debtor's business.[6]

This Regulation addresses issues of jurisdiction, recognition and enforcement, applicable law and cooperation in cross-border insolvency proceedings, as well as the interconnection of insolvency registers.

The material scope of the Directive, constituting my research subject, prescribes substantial minimum rules for preventive restructuring procedures and procedures leading to the entrepreneur's discharge of debt, not only in cross-border insolvency procedures but in solely domestic (national) insolvency cases as well, by complementing the material scope of the Regulation as well as exceeding it.

Preambular paragraph (2) of the Directive defines restructuring as the primary objective of legislation at EU level - within the framework set out in the Directive - that the 'restructuring should enable debtors in financial difficulties to continue business, in whole or in part, by changing the composition, conditions or structure of their assets and their liabilities or any other part of their capital structure — including by sales of assets or parts of the business or, where so provided under national law, the business as a whole — as well as by carrying out operational changes'. 'Preventive restructuring frameworks should, above all, enable debtors to restructure effectively at an early stage and to avoid insolvency, thus limiting the unnecessary liquidation of viable enterprises.'[7] The regulation also aims to prevent the accumulation of non-performing loans.

The Directive emphasizes the protection of the affected parties' (debtor's, creditors', employees') rights both in the preparatory phase (involvement of the parties in the procedure), during the procedure and in the enforcement phase. The time factor plays a crucial role in restructuring. Sections (4) - (6) of the preamble of the Directive point out, on the one hand, that the possibility of restructuring arises at different procedural stages in different Member States, making measures to restore the debtor's financial stability less effective at both Member State and EU level. On the other hand, ineffective debt discharge and disqualification frameworks prevent enterprises from staying afloat and encourage companies to

[5]Zoltán Csehi points out that the personal scope of Hungarian insolvency proceedings does not extend to private individuals, when exploring the links between the European Insolvency Regulation and Hungarian law. In Csehi (2014) in Pogácsás at 116..

[6]A further condition is the protection of all creditors and, if no agreement on a recovery plan can be reached, the preliminary procedure referred to in points (a) or (b). See paragraphs 9 to 11 of the Preamble and Article 1 of the new Insolvency Regulation.

[7]See preambular paragraph (2) of the Directive.

relocate to another jurisdiction to allow for a fresh start within a reasonable timeframe. In my view, this latter carries the risk of forum shopping too.

The Position of Restructuring Procedures in the Hungarian Insolvency Law

Based on current legislation, debtors with payment difficulties may resort to the following non-contentious civil court procedures for the restoration of their solvency in Hungary. *Bankruptcy procedures* aim to restore the solvency of economically distressed but still salvageable economic entities through the institutions of moratorium and the so-called reorganisation programme to avoid the liquidation of the debtor entity.[8] Bankruptcy procedures are insolvency procedures regulated by Act XLIX of 1991 on bankruptcy procedures and liquidation[9] and are non-contention civil court procedures opened upon application to the court in which the debtor is granted a moratorium on payment to facilitate reaching a composition agreement it attempts to reach.[10]

Natural persons' debt settlement procedures are procedures allowing the settlement of debts for natural persons experiencing payment difficulties. The purpose of the debt settlement procedure is to ensure that the debts of natural persons in payment difficulties are settled and their solvency restored within a regulated timeframe using the necessary assets and income. The procedure must not be aimed at the definitive discharge of the debtor's payment obligation. For this Act CV of 2015 on the debt settlement of natural persons was established[11]. The *personal insolvency* is a legal institution aimed at freeing indebted individuals from the debt trap, with the primary objective of restoring the debtor's ability to pay, by reconciling the interests of the debtor and their creditors, under public supervision.[12]

In insolvency proceedings, liquidation proceedings are non-contentious proceedings within the jurisdiction of the court against an entity that is already in debt, the purpose of which is to distribute the assets of the entity to its creditors in a specified order, by dissolving the entity as a legal one without succession. In addition to bankruptcy, liquidation proceedings are insolvency procedures governed by the Bankruptcy Act on the Bankruptcy and Liquidation Proceedings Act.

For the purpose of compliance with the Restructuring and Insolvency Directive, on 21 May 2021, the Hungarian National Assembly adopted Act LXIV

[8]Nagy (2001) in Pogácsás (2001) at 186.
[9]Hereinafter - *Bankruptcy Act.*
[10]Csőke, A., Fodorné Lettner, E. & Cs. Juhász (2009) at 55.
[11]Hereinafter - *Personal Insolvency Act*. In this context, reference should be made to the Entrepreneurship 2020 Action Plan [COM(2012) 795 final, 09.01.2013] adopted on 9 January 2013, Commission Recommendation of 12.3.2014 on a new approach to business failure and insolvency [COM (2014) 1500 final, 12. 03.2014], Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) [OJEU 172/18. 26.6.2019].
[12]Farkas, Cs., Kaprinay, Zs., Varga, I., Halászné Balkay, H., Sziklai, M. & I. Völgyesi (2015) at 45.

(hereinafter - the *Restructuring Act*) on restructuring and the amendment of certain acts. The new legislation sets out the civil material and the procedural law rules of restructuring as of 1 July 2022, and introduces a new non-contentious civil procedure, the civil non-contentious court proceeding for restructuring. The integration of restructuring procedures in the Hungarian legal system was implemented by the creation of several new legislations and the amendment of some existing ones. Among the implementation regulations promoting the objectives of the Restructuring Act, Government Decree 762/2021 (XII. 23) on restructuring experts appointed by the court, Government Decree 763/2021 (XII. 23) on the detailed rules of debt settlement proceedings for natural persons, Decree 7/2022. (IV. 4) IM on the detailed rules of the court-appointment and termination of the appointment of restructuring experts were adopted. Furthermore, the Bankruptcy Act, Act V of 2006 on public company information, company registration and winding-up proceedings[13], Act CLXXXI of 2011 on the court registration of non-governmental organisations and related procedural rules, Act XCIII of 1990 on duties, Decree 8/2022 (IV. 4) IM on the amendment of Decree 14/2002 (VIII 1) were amended.

The Purpose of Restructuring, the Restructuring Plan and the Role of the Restructuring Expert in the Procedure

Section 6 of the Restructuring Act sets out that the purpose of restructuring is to adopt and implement a restructuring plan with some or all of the creditors and thus prevent the debtor's future insolvency and ensure the debtor's financial viability. For the purpose of reaching this objective, therefore, restructuring constitutes measures aimed at restoring the financial balance of the debtor, including changing the composition, the conditions or the structure of the debtor's assets and liabilities and any other part of its capital structure. Among these measures, the Restructuring Act lists as examples the sale of the debtor's property or part thereof, or the sale of any participation in the debtor[14]

The condition for restructuring is the likelihood of the company's insolvency. As Fabók points out, "[...] the definition of the likelihood of insolvency bears a central significance here: it constitutes the entrance point into the restructuring procedure."[15] In addition to the definition of insolvency, Section 2(2) of the Restructuring and Insolvency Directive renders the interpretation of the likelihood of insolvency into Member State jurisdiction. Among the Explanatory notes, the Restructuring Act defines the likelihood of becoming insolvent as a situation [...] in which there are reasonable grounds for believing that the debtor will be unable to meet his/her outstanding payment obligations when they fall due, unless further measures are taken.[16]

[13]Hereinafter - *Company Procedures Act*.
[14]See Section 3(1)16 of the Restructuring Act.
[15]Fabók (2020*) in* Bodzási 153.
[16]See Section 3(1)8 of the Restructuring Act.

The first step in restructuring is the approval of the restructuring plan, which in fact starts with the classification of the creditors' claims. During the preparation of the restructuring plan, the debtor must compile the list of creditors whose claims must be assessed in relation to the restructuring already before the adoption of the restructuring decision.[17] The debtor must rank the creditor claims in the following four classes, the order of which does not mean the order of fulfilling the demand: *a)* insured creditors' claims, *b)* creditor claims related to business activity, *c)* other creditor claims, and *d)* creditor claims arising from transactions in the debtor's sphere of interest. The law stipulates that the principle of equal treatment must be ensured concerning affected creditors belonging to the same class of creditors.

Sections 45-46 of the Restructuring Act detail the content of the restructuring plan, and prescribe in writing its compulsory inclusion. Besides the classification of creditor claims, the plan must demonstrate how the insolvency of the company can be prevented and its continued operation maintained.

If the vote on the restructuring plan has not produced the necessary consensus for its adoption among all classes of creditors, the debtor, the debtor's equity holder with at least a majority interest, or with the debtor's consent, any of the creditors concerned may apply to the court for the it to approve the restructuring plan by way of a cross-class cramdown. In this case, if the court approves the restructuring plan, it also applies to the dissenting creditor (class).[18]

The restructuring expert plays a crucial role in the implementation of the restructuring plan. The restructuring experts' responsibilities are defined by Government Decree 762/2021 (XII. 23) on the restructuring experts assigned by the court. The court shall, upon request, approve the participation of a restructuring expert in the proceedings or, in the cases provided for by law, appoint a restructuring expert ex officio.

The debtor, affected creditors possessing the majority of claims or insured creditors may submit an application to the court to issue an order approving the participation of the restructuring expert named in the application in the restructuring (Section 27 of the Restructuring Act). Upon ex officio assignment, the law makes a distinction between compulsory cases and cases at the discretion of the courts. The court shall appoint a restructuring expert ex officio (compulsory), if (1) - the court ordered a general moratorium and there is no restructuring expert appointed, (2) - if the court orders a limited moratorium and the claims related to the restructuring amount to no less than 25% of the balance sheet total of the debtor's last financial statement, there is no restructuring expert appointed, an application was submitted for the approval of the restructuring plan by way of a cross-class cramdown, and there is no restructuring expert appointed at the time of the submission, or (3) - a counterclaim is submitted in the non-contentious procedure for the approval of the restructuring plan, and no restructuring expert is appointed at the time of the submission.

The court may appoint an expert on a discretionary basis where a limited moratorium has been imposed and the creditors concerned so request to protect the interests of the creditors, where no restructuring expert has been appointed, or

[17]https://birosag.hu/sites/default/files/jogszabalyi_valtozasok_2022_julius.pdf at p. 11
[18]https://birosag.hu/sites/default/files/jogszabalyi_valtozasok_2022_julius.pdf 13-14.

where a counterclaim is filed in the non-contentious proceedings for the approval of the restructuring plan, and where a technical issue raised justifies the appointment of a restructuring expert in addition to the restructuring expert involved in the restructuring.[19]

As a general rule, only one restructuring expert at a time may be engaged in a restructuring.[20] Only organisations registered in the register of liquidators and national liquidation organisations registered in the official register may be assigned as restructuring experts. In its order appointing the restructuring expert, the court shall specify the tasks, rights and obligations of the restructuring expert [Section 25(2) of the Restructuring Act]. The primary task of the restructuring expert is participating in the preparation of the restructuring plan, providing assistance for the debtor and the affected creditors in negotiating about, agreeing on, and approving the restructuring plan, supervising the measures taken in connection with the debtor's negotiation of the restructuring plan and its approval by the affected creditors, supervising the debtor's business during the period of negotiations concerning the restructuring plan. This activity is performed in exchange for a fee. The Restructuring Act defines expert fees in bands. The rules of fee payment depend on whether the expert is assigned on request or ex officio. If the restructuring expert was appointed ex officio, the expert fee is defined by the court. As a general rule, upon assignment, the restructuring expert's fee shall be paid by the debtor. In other cases, it may be decided on by the debtor and the creditors concerned.

Features of Non-contentious Proceedings

The "preventive restructuring framework" prescribed in Article 4 of the Restructuring and Insolvency Directive was introduced by the Hungarian Legislature as a non-contentious procedure within the jurisdiction of the courts, which can be included in the reorganisation proceedings, and is only available to enterprises such as legal entities or other entities having civil status and carrying on economic activities. Restructuring proceedings can be included among non-contentious proceedings opened upon application under the jurisdiction of a court (the jurisdiction and exclusive competence of the Metropolitan Court of Budapest) in which legal representation is mandatory and there is no interruption, suspension, or granting of legal aid, and only limited stay and intervention are allowed, based only on legal authorisation. The restructuring procedure is based primarily on documentary evidence. However, the court can also order the evidence it considers necessary ex officio (if necessary, hold a personal hearing), ask the parties to the case and the restructuring expert for a written statement.[21]

[19]https://birosag.hu/sites/default/files/jogszabalyi_valtozasok_2022_julius.pdf 7-8.
[20]An exception is the case where [...] a counterclaim is submitted in the non-contentious procedure for the approval of the restructuring plan and, because of an arising technical issue, the assignment of an additional restructuring expert is justified beside the already engaged one. https://birosag.hu/sites/default/files/jogszabalyi_valtozasok_2022_julius.pdf
[21]See more details at Horváth (2023) at 2-3.

In the action, the deadline for the court's general obligation to take action is 8 working days (Section 14(3)). In restructuring procedures only a judge can make any decision that is subject to appeal.

The Restructuring Act defines both the material law and the procedural law conditions of initiating a restructuring procedure. As regards the material law conditions, Section 12 of the Restructuring Act prescribes rules in accordance with Section 3:16 of the Civil Code. In connection with restructuring, the debtor's chief executive officer is entitled to convene its decision-making body upon short notice. The decision on restructuring is made and its starting date is set by the debtor's decision-making body (hereinafter - the decision-making body) or, in the case of a debtor who is a single legal person, by its founder or sole member. For the initiation of the restructuring procedure, the debtor's chief executive officer prepares a submission - as a sort of precondition - which details at least a) the debtor's financial position, b) the facts and conditions supporting the likelihood of insolvency, as well as the non-existence of any legal obstruction to the decision on restructuring, c) the affected creditors' claims, the register of the creditors concerned pursuant to Section 40 - including disputed creditor claims - furthermore, which creditor claims it does not wish to include in the restructuring and why, d) any changes potentially affecting the debtor's operations during restructuring, e) what legal, economic and other aspects justify the restructuring, f) the circumstances based on which it is probable that negotiations with the creditors will be successful, and the restructuring plan will be accepted, and g) the starting date of the restructuring (Section12(2)). As a general rule, the decision-making body decides on the execution of the restructuring and the preliminary approval of the restructuring plan by three-quarters majority. Following the decision on restructuring, the debtor's chief executive officer must take every necessary action within his/her responsibilities to ensure consideration of creditor interests, and to reach the decisions within the competence of the debtor's decision-making body or its founder or sole member in case of a debtor who is a single legal person, therefore in particular the decisions required to avoid insolvency.

Within 5 days of reaching a decision on a restructuring request before the Metropolitan Court of Budapest, the debtor shall initiate the restructuring procedure, informing it of the decision on the execution of restructuring and its starting date. The application for the initiation of a restructuring procedure must be submitted electronically on the form published on the website of the National Office of the Judiciary. Among its provisions outlined for submissions, the Restructuring Act refers first to the rules of the Code of Civil Procedure[22], secondly, in Sections 20 and 22, it defines the mandatory content of the submission.

The debtor has the option to request the appointment of a restructuring expert and a moratorium at the same time as the opening of the proceedings, but can also request these only at a later stage of the proceedings.[23]

In restructuring procedures, it is mandatory to engage a restructuring expert. To facilitate negotiations on the restructuring plan, the court may, at the request of the debtor, order a moratorium suspending individual enforcement actions. An

[22]See Section 114 and 115 of the Code of Civil Procedure.

[23]https://birosag.hu/sites/default/files/jogszabalyi_valtozasok_2022_julius.pdf

application for a moratorium may only be submitted by the debtor. The Restructuring Act defines three types of moratorium: (i) general moratorium which applies to all the debtor's creditors, (ii) a limited moratorium, which applies to creditors who are included in the restructuring plan, and (iii) a temporary moratorium, which may be imposed until a final decision on the application for a moratorium is taken to protect the interests of creditors. For a general moratorium, the order of the moratorium is published by the court in the Cégközlöny (National Gazette). For a limited moratorium, the relevant decision is sent to the creditors to whom the moratorium is applicable. The moratorium also applies to any liabilities becoming due during the moratorium. A creditor subject to the moratorium may not initiate enforcement proceedings against the debtor during the moratorium period, and any pending enforcement proceedings initiated after the restructuring start date are suspended, nor may it initiate winding-up proceedings. During the moratorium period, the debtor is also entitled to a moratorium on the payment of claims of creditors subject to the moratorium that became due before the moratorium.

The moratorium can be extended and a new moratorium imposed, which can be initiated by the debtor, the restructuring expert and the creditor as well. A moratorium may be ordered for a period set out in the application, but no longer than 4 months. At the same time, if the period is extended or a new moratorium is ordered, it may not extend a total of 12 months.

Summary

In my view, the European Legislator has set an appropriate level of harmonisation through the framework set out in the Restructuring and Insolvency Directive, which we have achieved in Hungary by creating a new non-litigation procedure under the jurisdiction of the courts.

From the perspective of the past two years, there is not yet sufficient information, data and court practice available on the practical implementation of the legislation. But after a detailed review of the relevant legislation, it can be concluded that it is indeed an effective tool for companies to prevent future insolvencies and ensure their viability.

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Medical Liability for Omission under the Portuguese Criminal Law: A Critical Eye on Portuguese Jurisprudence

*By Elisabete Ferreira**

In the Portuguese legal system, criminal liability for omission can be conducted by the legal category that criminalises omission in itself, regardless of the result, or operate by equating omission with action. This is enshrined in section 10 of the Penal Code, as long as the omitting person has a personal legal duty to act as guarantor (section 10, no. 2). In medical criminal liability, the framework for a hypothetical omission by an on-duty doctor in emergency services has been controversial. In our legal system, section 284 of the Penal Code expressly stipulates that a doctor's refusal to administer care be punishable conduct. On the other hand, it is possible that the doctor on duty in the emergency room of a hospital has a personal legal duty to act as a guarantor, arising from the contract that binds him/her to the hospital. Thus, it is necessary to affirm a subsidiarity relation between the mechanism of equating omission with action resulting from section 10 of the Penal Code and incrimination under section 284 of the Penal Code. However, this has not been the major understanding of the jurisprudence of the Portuguese courts on this subject. For instance, when the refusal of assistance by a doctor causes the death of a patient, instead of convicting the doctor for homicide by omission (section 131 of the Portuguese Penal Code, ex vi section 10, numbers 1 and 2), courts are convicting as per section 284 – refusal of the medical doctor to provide medical assistance. The present work aims to critically present this jurisprudence, state the legal and doctrinal foundations that justify the inclusion of these hypotheses within the scope of crimes committed by omission and point out the practical importance of choosing this solution.

Keywords*: Omission; Committed by omission; Medical liability; Duty to act as guarantor.*

Introduction

Criminal liability is most common for the commission of a certain action. The offender develops an action which is foreseen by the Penal Code as a crime and will be charged and convicted accordingly[1]. However, over the years, the criminal relevance of omission has started to make sense in some cases[2]. We should bear in

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[1]Hereinafter, the Portuguese Penal Code will be referred to as PPC and the Portuguese Civil Code will be referred to as PCC.

[2]See Gómez-Aller (2008).

mind that the grounds for the criminal liability of omission is not in the omission itself, but instead, in the fact that the adoption of the necessary action would have preserved the protected interest. Behind every punishable crime is the aim of the legislator to protect a certain interest. For homicide, for instance, it is meant to protect life; for theft, it is meant to protect property; for kidnapping, it is meant to protect freedom, and so on. Not every interest behind a crime should give cause to criminal liability for omission of the action that would permit the protection of such interest because, otherwise, the State would be over intervening in one's freedom of action[3].

That is why the Portuguese legislature has set boundaries concerning the interests requiring protection for the criminal liability of a person who refuses to act, in order to protect those interests. We come across those boundaries implicitly in section 200 of the PPC as follows: "Whoever, in case of serious need, namely caused by a disaster, accident, public calamity or situation of common danger, which endangers the life, physical integrity or freedom of another person, fails to provide the necessary assistance for the removal of danger, whether by personal action or by providing assistance, shall by punishable by a prison sentence of up to one year or a fine as prescribed in the law".

This means that the interests we have been referring to are life, physical integrity, and freedom. Only when these interests are endangered, is admissible the existence of a legal duty to act, imposed by a principle of social solidarity. From paragraph 3 of the same section, we extract a valuable requirement for the criminal liability of the person legally obliged to act but failed to do so: "The omission of assistance is not punishable when there is a serious risk to the life or physical integrity of the omitting person or, when relevant, the assistance is not required.". If, somehow, the action which would eliminate or lessen the danger to the protected interest represents a serious risk for the one legally obliged to act, that action will no longer be demanded. If the grounds for the legal duty to act is social solidarity, this solidarity does not go so far as to put one's life or physical integrity in jeopardy.

What about the medical profession? How would a doctor be criminally liable for omitting a certain action which would save a patient's life, for instance? Let us submit the following hypothesis: John is the only doctor on call in the emergency room of the hospital. Alex is admitted in that same emergency room, with severe respiratory deficiency and seizures. The nurse in charge promptly alerts John for the urgent necessity of medical assistance. However, despite the nurse's insistent alerts, John is watching the final of the Champion's League and refuses to assist Alex before the end of the match. Once the match is over, John rushes to resuscitate Alex, however with no success. The autopsy reveals that Alex's death would have been prevented if John had immediately assisted the patient at the time of admission in the emergency room. Should John be criminally liable for Alex's death?

The present paper aims to discuss the criminal liability, under the Portuguese law, of a medical doctor on duty who refuses to assist a patient.

[3]See Carvalho (2022) at 550-551.

First, we will start by addressing the Portuguese criminal regime of liability for the omission of assistance in general, based on sections 10 and 200 of the PPC, moving on to the particularities of the criminal liability for omission of assistance in the medical profession. We will then present some Portuguese Superior Courts Rulings on this theme and critically analyse their conclusions. We will finalise our paper with the appropriate final remarks.

The Portuguese Regime of Liability for Omission[4]

Omission of Assistance or Commission by Omission?[5]

Criminal liability for omission, in situations of danger to the life or health of another person, presupposes three requirements:

1) that someone (one person or several) is in a situation of danger to life or physical integrity (in the sense of health, whether physical or mental);
2) that the omitting person can provide the necessary assistance to try to prevent (or reduce) the risk of this danger resulting in actual harm or death to the life or health of the person in danger;
3) that the omitting party has the legal duty to carry out the action, that is, the necessary assistance to prevent the danger from materializing into actual damage to the life or health (physical integrity) of the person who is in the respective dangerous situation[6].

Theoretically, under Portuguese law, criminal liability for omission of the action required to avoid a negative outcome to the protected interest of someone may occur in one of two ways: the omissive agent may be punishable under section 200 of the PPC (omission of assistance), or, eventually, if the omissive agent has a special legal duty to act, imposed by the existence of a particular relation between this agent and the person whose interest he/she is obligated to protect, the omissive agent be punished as if having acted to actually commit the omissive crime. For instance, if the omitted action would have prevented the victim from dying, in this case, the omissive agent may be convicted of homicide[7]. The decisive factors to choose from one of the two possible paths are: 1) the verification, in the concrete case, of the negative outcome to the protected interest; 2) the existence of the special relation between the omissive agent and the interest to protect.

[4]On this subject, see Dias (2019) at 1055-1116.
[5]About the distinction between the two, see Silva (2012) at 65.
[6]About the duty to act, see Nelkin & Rickless (2017) at 199-216.
[7]Section 131 or 132 of the PPC.

Omission of Assistance

In fact, as mentioned above, under section 200, anyone who, in case of serious need, namely caused by a disaster, accident, public calamity or situation of common danger, which endangers the life, physical integrity or freedom of another person, fails to provide the necessary assistance to the removal of danger, whether by personal action or by providing assistance, is punishable, regardless of the occurrence of the negative outcome to the protected interest. If I come across a person hit by a car and bleeding out in the street, I am legally obliged to provide help likely by calling an ambulance. If I walk away, I will be committing the crime of omission of assistance, regardless of the negative or positive outcome. This means that, if another person behind me called the ambulance just in time to prevent the victim's death, I will still be held accountable for the omission foreseen under section 200.

We may find some relevance to the verification of certain outcomes, as follows: for one, if the negative outcome was impossible to prevent, the omission of assistance becomes irrelevant, because the action was not adequate or necessary to prevent the violation of the protected interest. In the hypothesis mentioned above, if the injured person was in such a state that, regardless of the prompt intervention of the medics, his death was inevitable, then, convicting the omissive agent in this case would be senseless. One other outcome that may be relevant and that should be considered, is at the time when the judge is called to determine the adequate penalty under the circumstances, if despite the absence of assistance from the omissive agent, the interest remained protected[8].

One last point to reinforce, as previously mentioned, the idea that section 200 of the PPC lays its foundations in the principle of social solidarity that is binding to every member of the community, as a whole.

Commission by Omission

So, when should we resort to the equation of omission with action? Lest us look at section 10 of the PPC:

1) When a type of crime comprises a certain result, the fact covers not only the appropriate action to produce it but also the appropriate omission to avoid it, unless otherwise is the intention of the law.
2) The commission of a result by omission is only punishable when the omitting party has a legal duty that personally obliges him to avoid that result.
3) In the case provided for in the previous paragraph, the penalty may be particularly reduced.

To start, we should state that the equation will only be possible when the crime comprises the occurrence of a certain result. Take the most familiar example of the crime of homicide: homicide will only be committed if the death of the

[8]See section 72 of the PPC.

victim takes place. Otherwise, there is only an attempt of homicide. Paragraph 1 of section 10 specifically declares the equation of omission with action in such cases, as long as we can establish that the omitted action would be adequate to prevent the result, which consists in the violation of the protected interest. Again, taking homicide as the set example, to equate omission with action, the omitted action should be adequate to have prevented the victim's death. This section (section 10) of the PPC is systematically located in the general part of the penal code, and its function consists solely in establishing that equation.

The focal point of this section, however, lies in paragraph 2, where the law determines the cases when the equation will be imposed, by stating an indeterminate concept which consists in *the legal duty that personally obliges the omitting party to avoid that result*.

Filling in the Concept: Sources of the Legal Duty that personally obliges the omitted Party to avoid the Result

The grounds to the existence of a legal duty that personally obliges the omitting party to avoid the result are the following: the law, a contract, the unjustified creation of danger to a certain protected interest, the voluntary assumption of a duty of surveillance, the *dominium* over danger causes, such as a dog owner, the existence of a factual relation of mutual trust between the person in need of help and the omitted person, among a few others.

The law imposes a legal duty for parents to act to protect their children's interests, under section 1874 of PCC, between spouses, under section 1672 PCC, between cohabitants, under Statute 6/2001, 11.05.2001, and finally, for all people mentioned in section 2009 of the PCC, such as ex-spouses, descendants, ascendants, siblings, aunts and uncles, stepparents and stepchildren.

The Portuguese Regime of Liability for Omission when the "Omitting" Person is a Medical Doctor[9]

Crime of Refusal of Doctor (PPC, section 284)[10]

This crime is based on the special duty that falls upon the doctor, who is the one who has precisely the function of seeking (trying) to save the life and protect the health of the person who is in a situation of danger to his life or to serious harm to his health ("physical integrity"). The specificity of this crime lies in the failure to provide "the assistance of one's profession", that is, in the failure to provide medical assistance, assistance that appears, in the specific situation, likely to prevent the danger to life or health from arising, resulting in the death or serious injury to the health of the person in need of medical assistance. Therefore, this crime can only be committed by a doctor and the unlawfulness and gravity of this crime lies in the failure to provide medical assistance (in the words of section 284,

[9]See Domingues (2020). See also Souza (2006) at 229-238.
[10]For more developments on this subject, see Carvalho (2018) at 29-59.

in the failure to provide "the assistance of his profession"). Because such a crime can only be committed by a doctor (since only a doctor can provide assistance specific to the medical profession), that is why it is designated as a specific crime.

Comparing this crime of refusal of doctor (section 284), with the crime of omitting assistance (section 200), that can be committed by anyone (hence the term "common crime"), this crime of Refusal of doctor constitutes a more serious form of "failure to provide assistance" due to the special functional duty that falls upon the doctor. As it is more serious, the penalty can be up to 5 years in prison, while the crime of failure to provide assistance is only punishable with a prison sentence of up to 1 year or a fine as prescribed by the court.

In the case where a nurse (even one with extensive professional experience) refuses to provide assistance similar to the one the doctor would provide, he/she would not be considered for that crime but would only be convicted of omitting assistance, under section 200 PPC, or, eventually, of the crime of homicide, under sections 131 and 10, paragraph 2, or serious offense to physical integrity by omission, under sections 144 and 10, paragraph 2, if the "legal duty of guarantor" falls upon the nurse, as mentioned above.

Crime of Homicide or offense to Physical Integrity due to Omission of Health Care, when the omitting Party has the Legal Duty of Guarantor

A health care provider, should it be a doctor, nurse or a caregiver in a nursing home or an institution for the disabled, has a legal duty to act as guarantor of the life and health of those in need of the respective care. The failure to assure this care may induce the omitting person in criminal liability for the crime of homicide or intentional harm to physical integrity[11] or negligent homicide or negligent harm to physical integrity[12], depending on whether intent, or only negligence, regarding the result death or injury to physical integrity (health) was present.

When a doctor is on call in an emergency room of a hospital, or on working hours in a medical office, clinic or hospital, the doctor is bound by legal duty to act when a person is at risk (life threatening or physical integrity threatening). Section 10, paragraph 2 of the PPC is applicable, because we may assume the omitting party has a legal duty that personally obliges him/her by contract to avoid a detrimental result. If the doctor is on call in a public hospital, there should be a contract that makes him/her personally obligated to act. If the doctor is on call in a private hospital, or in a private clinic or medical office, where is the binding contract to be found? Is the open emergency room ready to receive patients with a proposal of contract, or only a mere invitation to contract? The answer is not irrelevant because if we are in the presence of a proposal, when the life threatened patient enters the emergency room, he/she is accepting the proposal, and therefore a contract with the hospital and the duty to act is binding for the medical staff. Whether the patient pays for the treatment or not is an issue to be solved with tort law. But if the open emergency room is considered an invitation to contract, then the patient's entrance is in essence making a proposal which the hospital may or

[11]See sections 131, 143 or 144 of the PPC.
[12]See sections 137 or 148 of the PPC.

may not accept. In that case, if by chance the patient is unable to pay, the hospital may decline care – refuse the proposal, and therefore, we will not assume the omitting party has a legal duty that personally obliges him/her to avoid the detrimental results.

According to what we have seen previously about the grounds of this legal duty to act, in this particular case, we cannot find another motive which may establish that particular legal duty that personally obliges him/her to avoid that result.

To simplify our line of thought, we will leave out of the discussion the cases where the doctor is on working hours in a private hospital.

Resolving the Hypothesis placed in the Introduction

Let us return to the hypothesis mentioned in the introduction of this paper: John is the only doctor present on call in the emergency room of the hospital. Alex is admitted in that same emergency room, with severe respiratory deficiency and seizures. The nurse in charge promptly alerts John for the urgent necessity of medical assistance. However, despite the nurse's insistent alerts, John is watching the final of the Champion's League and refuses to assist Alex before the end of the match. Once the match is over, John rushes to resuscitate Alex, with no success. The autopsy reveals that Alex's death would have been prevented if John had immediately assisted the patient, upon admission to the emergency room.

John should be charged and convicted by homicide (section 131 *ex vi* section 10, paragraphs 1 and 2 of the PPC). John has signed a contract with the public hospital, why which he is obliged to provide care to patients, within certain time frames. The homicide in this case is intentional because, under the described circumstances, John had to foresee that the delay in the assistance to the patient could cause his death, since he was warned of the severity of the situation insistently by the nurse.

Although this is the correct way to address the issue, the Portuguese jurisprudence has been sending mixed signals.

The Portuguese Jurisprudence on Liability for Omission when the Case is brought against a Medical Doctor

Oporto Superior Court (Relação) ruling from 10th July 2013 (process number 518/ 06.1TALSD.P2)

The main facts of this case were as follows: The patient was taken to the emergency room of the hospital, complaining of pain in his chest and leg. The nurse in the emergency room used the Manchester triage and assessed his condition with a yellow bracelet, at 04:30 a.m. The Manchester triage goes from blue (recommended wait for a maximum of 240 minutes), to green (maximum of 120 minutes), to yellow (sixty minutes), to orange (10 minutes) and finally to red (0 minutes). As time went by, the patient's condition deteriorated, one of the nurses

approached him and asked if he was feeling worse, to which he answered affirmatively. Nevertheless, no doctor came to assist or check on him. At 07:00 a.m. a nurse passing by found him in cardiorespiratory arrest. CPR were administrated for over half an hour, alas with no success. For a period of about two hours no patient was assisted in the emergency room, nor seen by a doctor, because all doctors had gone to get some rest.

The doctors who were in the hospital were prosecuted of refusal of doctors to act (section 284 of the PPC). In this case, homicide for omission of care was not even considered. The court convicted one of the doctors for violating section 284, on the assumption that if the doctor was on call in the emergency room, he had access to the listing of patients present who needed assistance, he was aware of the expected maximum wait time for each patient. Therefore, when deciding those patients could wait, the doctor was willingly accepting the risk that the waiting could result in a negative outcome for the patient. The Court considered that intent was present, if not direct or necessary, at least eventual. This means that the doctor had to foresee the fact that the delay in administering care could result in negative consequences to the health, or even to the life of the patient, and the decision to rest, regardless, was a gesture which demonstrated the conformation with that possibility.

However, this was not the view of the Oporto Superior Court which dealt with the appeal. In fact, not only was the crime of homicide by omission not considered (sections 131 and 10 of the PPC), but also this superior court was not convinced of the existence of intent of any kind. This meant that, since the refusal of a doctor is a crime solely punishable when intentional refusal of assistance was established, it led to the acquittal of all doctors. The Court found the doctors' behaviour merely negligent.

We cannot accept the understanding of this Superior Court. In my view, if a doctor is on call in an emergency room of a public hospital (or, for that matter, also in a private hospital), he has the duty to act. If the death of the patient was due to the high abundance of patients with higher priority, according to the Manchester triage, the omission of care would not be a criminal liability issue, since his omission would be justified by a cause of exclusion of illegality (*conflict of duties*, see section 36 of the PPC). However, in this case it was proven that there was not an overflow of patients, but that the doctors decided to take a break to rest (for about two hours). We find this behaviour completely unacceptable. Although it was nighttime, the doctors should only stop to rest if the emergency room was empty. During the day, doctors are not allowed to stop for two hours to rest. So, why should these doctors be any different? Their time to rest would arrive, as soon as their shift was completed. Going to sleep in these circumstances cannot be seen as a mere negligence, if due to the delay in assistance a patient dies or suffers permanent damages to his health. The Court should, at least, have convicted the doctor for committing the foreseen crime as per section 284.

However, having presente all the above, we find that the proper frame for this case was to consider that the doctor had committed a homicide, under section 131 or even 132 of the PPC, for omission of care (section 10 of the PPC) because, under the circumstances, the doctor was contractually required to assist patients in

need. He had a legal duty of guarantor. Therefore, omitting care should be adequately equated to the action of depriving someone of his or her life.

Oporto Superior Court (*Relação*) *ruling from 12th November 2008 (process number 0813421)*

Luckily, not all superior court rulings contradict the basic principles of criminal law. Let us look at another Superior Court ruling which properly framed the facts and convicted the omitting doctor for homicide in the following scenario.

A woman was hit by a car and rushed to the emergency room of the hospital. Once there, the doctor in charge ordered a series of exams he thought adequate. The woman complained of high levels of pain, but after assessing the case, she was discharged and sent home approximately after nearly six hours. She never stopped complaining about her severe physical pain. Less than 24 hours later, she died.

The first court ruling acquitted the doctor, on the grounds that it was not possible to conclude unquestionably that the death of the patient was caused by the lack of adequate medical treatment.

Oporto's Superior Court then maintained that, "As is clear from the sentence and the appeal, it is accepted that the defendant acted negligently, which is evident from the facts transcribed about what he should have done and did not do, through his own fault (from the investigation from the causes of the accident until the detection of the fracture of the D12 vertebra noted on the X-ray and period of observation), what is questioned is whether the cause of the deceased's death was the lack of adequate medical treatment." The Court acquitted the defendant sustaining the principle *in dubio pro reo*. Now, taking into consideration that a road accident occurred, which caused traumatic injuries and bone fractures, which required medical treatment, and that it was not demonstrated that those injuries alone caused death, as during the autopsy, no injury was found that, in itself, would justify death.

Considering that those injuries do not heal on their own but need to be treated, it seems obvious that the cause of death was both the injuries sustained in the accident as well as the lack of adequate medical treatment. It is the logical, immediate conclusion to take from experience, because a victim of a road accident, with those injuries, will most likely (almost certainly) die if not treated, given that the (treated) injuries alone would not lead to death, but to other effects such as quadriplegia. Thus, due to the injuries and the lack of treatment the victim died, the cause of death being the injuries on the one hand and the lack of treatment on the other."

In other words, the Court found that there was an obvious connection between the lack of adequate treatment and the death of the woman. The injuries she had suffered with the accident were not sufficient to cause her death, if properly treated. Therefore, it is evident that the omission of proper care caused the woman's death. The court convicted the doctor of negligent homicide (section 137 of the PPC), *ex vi* section 10, §1 and 2. In this case, the doctor had a legal duty to

act, based on section 284, *a contrario sensu*, and, of course, because of his contract celebrated with the medical institution where the doctor provided care.

One final remark to express that intentional homicide was never considered in this case because the attending doctor most likely did not foresee such an outcome. If he had, considering the average doctor's pattern of action, the doctor would probably have ordered further exams and would have paid more attention to the patient's complaints to get to the proper diagnosis and treatment.

Conclusions

Throughout this paper, we learned that in the Portuguese legal system, in general, criminal liability for omission can be conducted according to the legal category that criminalises omission in itself, regardless of the consideration of the result, or operate by equating omission with action, enshrined in section 10 of the Penal Code, as long as the omitting person has a personal legal duty to act as guarantor (section 10, no. 2).

When medical professionals are concerned, the framework for criminal liability for a hypothetical omission by a doctor who is on duty in an emergency service is controversial because, on the one hand, section 284 of the PPC explicitly stipulates that a doctor's refusal to assist in itself be deemed punishable conduct. It is possible to understand that the doctor on duty in the emergency room of a hospital has a personal legal duty to act as a guarantor, arising from the contract that binds him/her to the hospital, and, eventually, from section 284, *a contrario sensu*.

Thus, if theoretically both solutions are overlapping, in reality the court will have to make a choice. The correct choice, for this matter, is claiming the subsidiarity relation between the mechanism of equating omission with action, resulting from section 10 of the PPC, and the incrimination under section 284 of the same code.

However, this has not always been the understanding of the Portuguese jurisprudence. When the refusal of assistance of the doctor caused the death of the patient, for instance, instead of convicting the doctor for homicide by omission (section 131 of the Portuguese Penal Code, ex vi section 10, numbers 1 and 2), the majority of courts have been convicting as per section 284 – refusal to render treatment. To demonstrate this, presented here is the example of the Oporto Superior Court ruling from 10th July 2013 (process number 518/06.1TALSD.P2), in which the Public Prosecutor, first court and Superior court, all preferred to apply section 284.

Luckily, not all jurisprudence misuses section 284 of the PPC and the mechanism of equating omission with action, resulting from section 10 of the PPC, where criminal liability of medics is concerned. And here is a good example: Oporto Superior Court ruling from 12th November 2008 (process number 0813421). In this case, the doctor was convicted for negligent homicide (section 137 of the PPC), ex vi section 10, §1 and 2.

This last interpretation is the only one which respects the basic principles of the criminal law and the community sense of justice. Since the penalties are substantially different, letting the first choice prevail (using section 284), make us doubt the true fulfilment of the purposes of the penalties, such as of general and specific prevention in those cases. We do not intend to crucify the medical profession for their faults. However, we must not forget that these professionals hold the lives of people in their hands and, for that matter, have to be held accountable for their omissions when they lead to unfortunate outcomes, such as death or serious, permanent injury. Convicting a doctor for section 284 of the PPC, in circumstances like those mentioned above does not provide for proper accountability and does not pay a good service to Justice.

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Tracing the Application of Modern Principles of International Humanitarian Law in the pre-Christian War between King *Duṭugamunu* and *Elāra* in Sri Lanka

*By Raja Goonaratne**

The war between King Duṭugamunu and Elāra is the most significant singular war that took place in the pre-Christian period in Sri Lanka. It has the elements of modern international armed conflict (IAC). A local monarch waged it to unify the nation against an invading foreign force led by a foreign ruler who seized power through regicide. This historical conflict sparked extensive debates, criticisms, and varying interpretations, contributing to distortions of factual accounts. The studies analysing this battle from the perspectives of the modern International Humanitarian Law (IHL) is minimal. The branch of public international law that deals with IAC is International Humanitarian Law (IHL). The research problem that was investigated is 'Did the Sri Lankan monarch comply with the modern principles of international humanitarian law when there were no such laws at that time in the world and thereby, does that monarch deserve to be called as the founder of IHL? Accordingly, this study aims at analysing the motives, intentions, and conduct including the pre-conflict, in-conflict, and post-conflict behaviour of key actors and the war's outcome from the perspectives of IHL. The methodology used for this study is literature review. It is qualitative and interpretative in nature. The historical sources, international conventions and national legislations were used as primary and secondary sources for this purpose. The focus of the analysis is the evaluation of IHL principles in the context of the historical war. This study provides a unique analysis that suggests the application of principles akin to modern IHL by the ruling monarch nearly two millennia before the formal establishment of such principles. The major finding is that some 2019 years prior to the international community introduced the modern IHL principles such as humanity, avoidance of unnecessary suffering, proportionality of damages, humane treatment of prisoners of war (POW) etc., the ruling Sri Lankan monarch has recognised and applied them in this war and has recognised the new principle of Eternal Honour to POWs which is yet to recognise by IHL.

Keyword*s: Humanitarian; International; Law; Vijiṭapura; War*

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Introduction

The most significant war in the nature of international armed conflict (IAC) that had ever taken place in the long history of Sri Lanka is the battle popularly known as *Vijitapura* Battle (*VB*) or *Duṭugamuṇu-Elāra* Battle (DEB). The ruling Sri Lankan monarch waged it against an invasive foreign ruler with the sole intention of unification of the country. This historical conflict was subjected to extensive debates, criticisms, and varying interpretations contributing to distortions of factual accounts.[1] Although it has been analysed from multi-disciplinary perspectives, there is no comprehensive analysis from the perspectives IHL. This research intends to address that gap.

Objectives of the Research

he main objectives of this study are to analyse the *Duṭugamuṇu-Elāra* Battle from the perspectives of the international humanitarian law and to explain whether the rules of war that the Sri Lankan monarchs applied in ancient wars are different or similar to the modern IHL principles. Accordingly, King *Dutugamunu's* intention, and the pre-conflict, in-conflict, and post-conflict behaviour were analysed from the perspectives of IHL. Also, this paper argues that the Sri Lankan monarch *Dutugamunu* deserves to be recognised as one of the earliest proponents of international humanitarian legal thoughts.

Research Problem

The research problem that was investigated is 'Did the Sri Lankan monarch comply with the modern principles of International Humanitarian Law when there were no such laws at that time in the world and thereby, does the monarch deserve to be recognised as one of the earliest proponent of IHL in the ancient times?

Methodology

This study adopted traditional doctrinal legal research methodology combined with qualitative approach based on literature survey and it is interpretative in nature. The historical sources, such as the Great Chronicle or *Mahāvaṁsa* and international conventions were used as primary sources for this research. Secondary sources include the relevant scholarly works such as textbooks, journal articles and other relevant materials.

The Origin of Human Aggressiveness

War is the culmination of human aggressiveness and the aggressiveness is one of the fundamental factors of group conflicts among humans[2] and as a result a

[1]Dhirasekera (1987).
[2]Böhm, Rusch & Baron (2024).

major part of the human history consists of the stories of war victories and defeats. Wars among tribes, clans, castes, ethnic communities and the countries were the constant incidents for which there was only a beginning and no ending. The most devastating wars that the man fought so far against each other are the first and second World Wars.[3] Even now at the moment of writing this article, the Russia-Ukraine, and Israel-Arab (Hammas) are at war[4].

It is a scientifically proven fact that the man evolved from the primate ape.[5] From the time human species gradually began to evolve from ape into a more complex society with organised governing structures under a king or ruler, the competiveness in every respect grew rapidly. In such competitive social conditions, the early view was that each creature represented a frustration or a danger to others which resulted in developing the urges of rage and aggressiveness in the human society[6]

However, the modern researchers on the origin of human aggressiveness have brought up two major opposing viewpoints - Rousseau–Kropotkin and Hobbes–Huxley. The former view is that humans are naturally peaceful but corrupted by society and the latter is of the view that humans are naturally aggressive but civilised by society. Still later, researchers have found out that humans have a high propensity for proactive aggression and a low propensity for reactive aggression. Patterns of violence therefore appear to have been shaped by natural selection.[7]

Not only scientists but also, philosophers and religious founders have attempted to theorise as to how human society evolved and especially, what contribute for man's behaviour including bellicosity. David Hume (1711-1776 CE) whose views on the nature of man greatly influenced Charles Darwin; was of the view that man in general is not naturally selfish and the feelings of love, justice, benevolence etc. are in-built but are constantly changing.[8] Another great scientist cum philosopher is Immanuel Kant (1724-1804 CE) whose view of the human nature is that man is influenced by biology, upbringing and culture, yet they are not the determining factors.

The Gautama Buddha's (BCE 563- 483) analytical views on the human mind are comparable with various branches of modern western psychology such as phenomenological psychology, psychoanalytical psychotherapy, humanistic psychology, cognitive psychology and existential psychology.[9] He explains the intricacies of the human mind and the arising of bellicosity and aggressiveness in a large number of his discourses or *suttas* such as *Aggañña Sutta*. According to his analysis, at the beginning, humans were ethereal but, motivated by greed, begin to consume matter and gradually acquired denser bodies. In due course, there occurred sexual differentiation and procreation, and human societies organised on caste lines come into being. Due to greed, wickedness arose and a king was

[3]Royde-Smith & Showalter (2018).
[4]Nartey (2024).
[5]van Wyhe (2024).
[6]Montgomery (1968).
[7]Wrangham (2017).
[8]Baggini (2021).
[9]Aich (2013).

elected to enforce the law and then wars and all other man-made calamities began to set in motion etc.[10]

It is now generally believed that the Europeans may have been the first humans capable of organised warfare. According to a recent research in Germany it is observed that warlike interactions may have taken place among early hominines as far back as late Mesolithic period.[11]

Tracing the History of International Humanitarian Law

Human beings in nature are selfish and motivated by uncontrollable desires for material gains.[12] So, they would do anything to achieve their goals. The moral and religious codes are not strong enough to control human conduct. With the evolution of human society into more organised social structures, many different laws, legal systems, penal methods, and institutes to enforce those laws became a necessity.

The philosophers, liberal thinkers and jurists have taken many efforts to define the words ‘law’ and ‘justice’. Greek philosopher Plato (427-347 BC) who propounded philosophical idealism defined law as a 'social control'. William Blackstone (1723-1780 CE), a leading theorist and proponent of the English Common Law, defined the concept of law as a 'rule' that differentiates 'right' from 'wrong'.[13] Nevertheless, no philosopher or jurist has formulated a universal definition that can be applied across cultures.

However, 'law', may be defined as a set of 'rules' that control human conduct to ensure better coexistence with all animate-inanimate things in the universe and ‘justice’ as the ultimate outcome of law which bears the hallmark of equality and peace.[14]

In this sense, international humanitarian law, as a specific branch of public international law; refers to the rules that relates to the saving life and property of those who do not get involved in hostilities directly and limiting the violence for what is absolutely necessary to achieve the objects of the conflicts.[15]

Solferino Battle and the Birth of Modern IHL Principles

It is popularly believed that the historical event that led to the emergence of the modern principles of IHL is the battle of *Solferino* that occurred on 24th June 1859 in the war of unification of Italy.[16] In this war, the French and Sardinians, a native community living in the Sardinia Island under the leadership of Napoleon III, went into war against the Austrian troops.

[10]Keown (2004). .
[11]Pearson & Thorpe (2005).
[12]Carlson, Adkins, Crockett & Clark (2022).
[13]Nolen (2019).
[14]Goonaratne (2021).
[15]Sassoli, Bouvier, QuintinIcrc & Icrc. (2011).
[16]Droege & Giorgou (2022).

The first gunshot was fired at 3.00 a.m. and by 6.00 a.m. it had blown into a deadly war. Some 300,000 men killing each other and by afternoon, Austrian troops retreated leaving 6000 dead and 40,000 wounded. French and Sardinian armies were not prepared enough to look after such a large number of dead and wounded. As a result, the wounded started to move in search of food to the nearby village called *Castiglione*.

Accordingly, some 9000 wounded had poured into the street of *Castiglione*. It is in this extremely unsightly human tragedy a person called Henry Dunant cared for those wounded by taking them to the nearby church with the support of the local women. Henry Dunant happened to be at *Solferino* on this fateful day as he wanted to meet Napoleon III to collect some documents for his banking business.[17]

Although the *Solferino* battle is a 19th century incident that paved the way for the emergence of modern principles of IHL, it does not mean that there were no such wars in the past or principles similar to the modern IHL. Perhaps the ancient monarchs and military leaders may have implemented more advanced principles than the existing IHL principles in different cultures across the world. The succeeding paragraphs analyse a similar war that happened in ancient Sri Lanka and the rules of war that the Sri Lankan monarch applied and will discuss to what extent those rules are different or similar to the modern IHL principles.

Key Concepts and the Principles of the Modern IHL

The entire edifice of modern IHL rests on four cardinal principles, i. e. (a) Principle of humanity, (b) Principle of distinction (c) Principle of proportionality and (d) Principle of military necessity.[18]

(a)T**he Principle of humanity**

The essence of the principle of humanity is that since wars are man-made, at every occasions of war all belligerent parties must adhere to the concept of humanity and in that sense they must take all possible precautions to minimise the suffering to be caused to the combatants and the civilians. Regards must always be given to the principle of humanity irrespective of the fact whether a combatant is a friend or foe or in the allied side or enemy side, or in and off the battle field etc.[19] So, due respect and recognition to the humanity of the combatant be given at all possible times. It is generally believed that humanity in this context underlies the idea specified in the preamble to the Hague Convention 1899. It is known as 'Martens Clause' as Fyodor Fyodorovich Martens introduced this clause to the Hague preamble.

(b) **The principle of distinction**

This principle is a corollary of the principle of military necessity. Accordingly, it emphasises that at all times of non-international armed conflict or

[17]ICRC, 'The Battle of Solferino (24 June 1859) - ICRC'
[18]ICRC, 'Fundamental Principles of IHL | How Does Law Protect in War?
[19]Arai (2011).

wars among states the belligerent parties need to ensure that they make effective distinctions between;

(i) Civilians and combatants
(ii) Civilian objects and the military objectives.

In common parlance, civilian means any average person other than uniformed persons or members of the armed forces either in the lawful armed forces or the organised armed groups. The meaning assigned to this term in IHL too does not very much differ from this common meaning. Accordingly, in an international armed-conflict or a war situation among two or more states, a civilian means and includes any person is who not a member of the armed forces or a person who does not take part in "*levée en masse*" (i.e. the inhabitants of an unoccupied territory who organise themselves in taking arms voluntarily against approaching invasion). In case of doubt whether a person is a civilian or not, it is assumed that the disputed person is a civilian. In the case of internal armed conflicts too, a civilian means a person who is neither a member of the state armed forces nor a member of armed groups.

In both international armed conflict and internal armed conflict situations, all belligerent parties, especially the state parties are bound to take all measures to ensure that such distinction are made known to all members of their forces before any effective military operations are carried out.[20]

In both IAC and NIAC conflict situations, civilians are entitled to have special protection under IHL. In addition, there are specific categories of civilians who should be given special protection such as women, children, journalists, religious persons, medical staff etc.

Also, any object which is not used to achieve military objective is called civilian objects. So, under this principle all civilian objects are protected by IHL unless such object is used for military objective. Accordingly, dwelling houses, places of worship, cultural buildings etc. are considered as civilian objects and also, if there is a doubt as to whether a particular object is civilian or not, the presumption is that such an object is to be reckoned as civilian object.

(c) **Principle of Proportionality**

This principle too is inter-related to the principle of military necessity. The principle of proportionality prohibits the pursuit of military attacks against objectives which hold risk of "incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated"[21]. It simply means that the military advantage to be gained and the harms to be caused should be proportionate to each other. In other words causing excessive suffering or harms is not warranted under this principle. Therefore, the principle of proportionality prohibits direct attacks against civilian objects if the outcome of such attacks would cause excessive and disproportionate incidental loss of civilian

[20]Dowdeswell (2016).
[21](n 15) Sassoli, Bouvier, QuintinIcrc & Icrc. (2011).

life and, injury to them or civilian objects as against the anticipated military objectives.

In this sense, it is clear that the principle of proportionality seeks to limit the damages to be caused by military operations by requiring that the effects, the means and methods of warfare must not be disproportionate to the military advantage or result to be gained.

(d) **Principle of Military Necessity**

The principle of military necessity is an all-embracing concept which means basically, that all nations big or small being sovereign-equal as per the provisions of the UN Charter, have; for multiple reasons- the right to defend their territories and the people from external and internal aggressions.[22] Therefore, neither domestic laws nor any principles of international laws prohibit waging war. However, unlimited right of the sovereign to wage war or use military force is now an obsolete norm in the concept of sovereignty in transition.[23]

Therefore, the balance between these two principles needs to be maintained and IHL principles ensures how to maintain that balance. Emanating from this principle are two other principles i.e. refraining from causing superfluous injury and unnecessary suffering. Those two notions emphasise that although military necessity exists, no belligerent party are allowed to inflict extra injuries and unnecessary sufferings to the combatants.

The Background of the *Duṭugamunu- Elāra* War

It is useful to have a brief look at the political situation that prevailed in the country before the war. According to the chronological table of monarchical governance of Sri Lanka, *Elāra (145-101 BCE)* is the 14th ruler and his successor *Duṭugamuṇu* (101-77 BCE) was the 15th monarch. *Elāra's* predecessor was King *Asēla* (155-145 BCE) who had ruled 10 years. King *Elāra* grabbed the power from King *Asēla* by killing him in a war. King *Asēla's* predecessor was two Tamil usurpers named *Sēna* and *Guttaka (177-155 BCE)* and each of them ruled 10 and 12 years respectively.[24]

Although King *Elāra* ruled little over four decades, he was a foreign invader who grabbed the power of Sri Lanka by killing the then ruling monarch King *Asēla.* In this context, as the heir-apparent to the throne Prince *Duṭugamuṇu* might have foreseen the future of the country especially in view of many shortcomings of his ailing father's rule in the south.

Chapter 25 of the Great Chronicle-the *Mahāvaṁsa* and other historical literary works provide vivid descriptions of the DEB including how King *Duṭugamuṇu* planned the campaign against *Elāra*, the war strategies, number of separate battles he waged against local power-centers of *Elāra* and his viceroys, the time period he spent for fighting and finally, how his army entered the last

[22]Khan (2017).
[23]Lapidoth (1992).
[24]Wickremasinghe (1994).

bastion of *Elāra* - the *Vijitanagar* and how the final fight between the two leaders was fought emerging *Duṭugamuṇu* victorious.

According to the modern IHL terminology, *Duṭugamuṇu-Elāra* War is an international armed conflict (IAC)) as it bears all the essential elements of IAC. It is considered the most important turning point in the history of Sri Lanka. Just seven days after defeating Elāra,King *Duṭugamuṇu* faced the second IAC with *Bhaluka*; the nephew of *Elāra's* General *Dīghajantu.*

Table 1. *The Basic Facts about Duṭugamuṇu Elāra War*

S/N	Battle Description		Strength of Forces		Victories
	Name	IAC	Human Forces	Other Forces	
1	Vijitapura Battle- Duṭugamuṇu- Elār a Battle	International Armed Conflict	a) 500 Bhikkūs – religious dignitaries b) A mighty army- infantry - the size of the army has been mentioned in vivid manner, i.e. 'with one end yet in Mahagama, the train of army reached Guttahalaka' c) 10 giant generals i.e. Nandhimitra, Suranimala Gōtaimbhara, Thērapuththābhaya, Mānābhara ṇa, Vēlusumaṇa, Kanjadēva, Pussadēva, Mahasēna Pussadēva,	a) Charioteers b). Cavalry men	a) 32 kingdoms and kinglets were defeated. b) Sri Lanka was unified under one sovereign ruler.

Source: The Great Chronicle- Chap 25 of Mahāvaṁsa and Vamsattappakasini

Analysis of the Intention and Conduct of King *Duṭugamuṇu* in the Wars with King *Elāra*

In any international or non-international armed conflicts, the human minds are the most important determinant factor not only of the success and failures but also the severity of the conflict. More importantly, leaders can influence the onset of war, the severity and the duration of the conflict as well. So, the psychological characteristics of conflict leaders largely influence the war severity.[25]

Since warfare is a collective coordinated action, the leadership action and perception influence hugely the group action as well. Sometimes, leaders may also seek private gains at the expense of group interests. The evolutionary psychology provides insights as to how leaders could manipulate audience preferences when their own interests do not align with the group interests. Specifically, when leaders anticipate great private gain from foreign aggression while facing steep public resistance at home, leaders will misinterpret the conflict as defensive rather than offensive in nature[26].

In the light of above discussion, it is appropriate at this juncture to evaluate King *Dutugamun's* mentality and the conduct of war at the relevant three times-scale, i. e. pre-conflict, in-conflict and post-conflict to understand his intention objectives of the war.

- **Pre-conflict Conduct of King *Duṭugamuṇu***
  The Great Chronicle - *Mahāvaṁmsa* - says that he openly said to the gathering before he left for war these words "*I shall go to the further bank of the Gañga to make the Dhamma shine forth".* In this context, '*Dhamma*' denotes the entire body polity including the civilisation, nation, culture religion etc. The second IAC with *Bhalluka* happened just seven days after defeating *Elāra.* It is also not what he wanted but compelled to face it in the name of unification of the country. So, it is evident from the above statement that his intention and motive was not to kill people or to capture other's land or to cause injuries but to unify the country by uprooting the foreign invasive rule.
- **In-conflict Conduct**
  The Great Chronicle - Mahāvaṁmsa further *says* that when his battalion entered the last bastion of King *Elāra* at *Vijitapura,* King *Duṭugamuṇu* has emphatically said to his 10 giant Generals that he himself wanted to have the final fight with King *Elāra.* This implies not only his bravado and aplomb but also that his intention to minimise harms to property or human life by getting involved a large number of army.
- **Post-conflict Conduct**
  It is the post-conflict behaviour of King *Duṭugamuṇu* that makes him the most authentic and extra-ordinary monarch in his time in the world history. He treated his arch enemy; the deceased prisoner of war (POW)

[25]Smith (2018).
[26]Lopez (2019).

in the most humane manner. Accordingly, after the victory King *Duṭugamuṇu* performed the following unprecedented noble acts unparalleled in the human war history.

(a) He summoned all the people in the vicinity and with them paid homage to the slain King *Elāra.*
(b) Then he built a pyre and cremated his body there.
(c) He built a monument on the place where King *Elāra* fell and
(d) Then King *Duṭugamuṇu* issued a Royal Decree/Edict or Lawful Order- ordering all his subjects to pay respect to King *Elāra's* monument by stopping music and alighting from horseback etc. *Mahāvaṁsa* further says that at the time when the relevant chapter of *Mahāvaṁsa* was being written all monarchs who came after King *Duṭugamuṇu* and the people whenever they happened to pass that monument still pay their homage as ordered by King *Duṭugamuṇu*. It shows the efficacy of the Royal Order of King *Duṭugamuṇu*.
(e) King *Duṭugamuṇu was* not happy even after all the victories when it came to his mind of the myriads of people who lost their lives in the battles. This episode clearly shows his post-conflict mind-set which is very much in compatible with his in-conflict and pre-conflict mentality.

IHL Principles and Provisions of IHL Treaties Applicable to King *Duṭugamuṇu – Elāra* Wars

When *Duṭugamuṇu-Elāra* war is analysed from the perspectives of the modern principles of IHL and more specifically, IHL treaties, it is observed that the provisions of the following Geneva Conventions have direct applicability.

- All parties to an international or non-international armed conflict are bound to take all possible measures to prevent despoilment of the dead – Geneva Convention I Article 15(1), Geneva Convention II- Article 18(1), Geneva Convention IV- Article 16(2), Additional Protocol I Article 34(1), Additional Protocol II- Article 8, and Customary International Humanitarian Law Rule 113.
- Prohibition of ill-treatment and mutilation of dead bodies - Geneva Conventions I-IV, Article 3(1)(c), Additional Protocol II - Article 4(2)(a); Customary International Humanitarian Law Rule 113.
- The bodies of the deceased should be disposed of in a respectful manner - Geneva Convention I Article 17, Geneva Convention II - Article 20, Geneva Convention III - Article 120; Geneva Convention IV - Article 130; Additional Protocol II - Article 8 and Customary International Humanitarian Law Rule 113.
- Cremation of dead bodies - Geneva Convention I - Article 17(2), Geneva Convention II - Article 20(2), Geneva Convention III - Article 120(5),

Geneva Convention IV- Article 130(2) and Customary International Humanitarian Law Rule 115 allow cremation of dead bodies under certain exceptional grounds such as (i) reasons of hygiene, (ii) on religious grounds, (iii) the deceased prisoner of war or civilian has stated it to be his wish. King Dutugamunu would have decided to cremate the body of King *Elāra* on religious ground because King *Elāra* being a follower of Hinduism, the most respectful manner to dispose his body is by cremation under religion of the deceased POW.

- Respect and maintain graves- the parties to armed conflicts should ensure that graves are respected properly maintained and marked - the graves of deceased POWs, internees and people whose deaths occurred in the conflict - Geneva Convention I - Article 17(3), Geneva Convention II - Article 20(2), Geneva Convention III - Article 120(4), Geneva Convention IV - Article 130(1 and 3), Additional Protocol I - Article 34(1, 2 and 3), and Customary International Humanitarian Law Rules 115 and 116
- Specially, Geneva Convention Relative to the Treatment of Prisoners of War have direct applicability. Article 4 defines "prisoners of war" (POW). According to this Article all those enemies who fell into the hands of enemy party is called POW. In this sense, *Elāra* and all his fallen soldiers are POWs. Articles 10, 23, 28, 33, 60, 65, 66, 67, 72, 73, 75, 109, 110, 118, 119, 122 and 132, provide explicit principles regarding treatment of POWs.

Accordingly, POWs are entitled to humanely treatment, medical treatment, and neither physical nor mental torture, nor any other form of coercion can be inflicted on POWs to secure information from them. Also, POW should be given adequate food, water, clothing and accommodation.

Especially, Article 120 specifies the principles and procedures to be adopted in regard to deceased POWs. Accordingly, the following humane treatments should be accorded to deceased POWs -

(a) Deceased POWs should be honourably buried or cremated.
(b) Deceased POWs should be buried in individual graves
(c) Cremation is allowed only if it is imperative.
(d) All particulars of deceased, buried and cremated POWs must be recorded.

It is observed that all the post-war actions of King *Duṭugamuṇu* referred to in (a) to (d) of sub-paragraph 5 above were performed by him as the ruling monarch and the commander- in- chief- of his forces. They are not only compatible with the most hallowed principles of the modern IHL but also it shows his advanced juridical thought.

Introduction of the Principle of 'Eternal Respect' to Deceased POWs

The most unprecedented phenomenon is that King *Duṭugamuṇu* introduced a new legal concept and a principle that none of the Geneva Conventions or especially Article 120 of the Geneva Convention on the Treatment of Prisoners of War has yet to recognise. That is the **'Principle of Eternal Respect to the Deceased POWs'**. It is in full agreement with the principle of humanity which is one of the four cardinal principles of modern IHL.

It is in conceptualizing the principle of **'Eternal Respect to the Deceased POWs'** that the as the ruling monarch he performed the following acts in honour of his fallen enemy:

(a) Erection of monument in honour of King *Elāra* (deceased POW).
(b) Passage of law ordering the people present and future to pay respect to the fallen enemies.

All cultures across the globe pay respect to their loved ones who are dead and gone as long as they remember them. Generally, it is recognised as one of the fundamental behavioural trait of the civilised society. In the case of international armed conflicts, the commemoration of the deceased POWs in the D-Day operation of World War II is performed up-to-date. What underlies in that commemoration is the principle of showing eternal respect to the dead POWs. However, there is not a single treaty provision in the IHL treaties or customary international humanitarian Rules recognizing it as a legal obligation of the parties to the conflicts.

Conclusion

It is seen that King *Duṭugamuṇu's* pre-conflict, in-conflict and post-conflict mentality and conduct amply demonstrate that he acted due to military necessity to free the country from foreign usurper. So, *Dutugamunu - Elāra* War provides undeniable true evidence of adoption of all key principles IHL, i.e. the principles of humanity, proportionality, avoidance of causing unnecessary or superfluous injuries and humane treatment POWs etc.

In addition, it is quite unprecedented as all these happened some 2183 years before where the world was totally unaware of such principles. It is more than 2100 years prior to the Geneva Conventions of 1949 that King *Dutugamunu* introduced those principles to the world. It was King *Duṭugamuṇu's* introduction to the world of those principles predates 2019 years from the *Solferino* battle in 1859 CE which is popularly considered as the 'big-bang' event of the emergence of IHL principles.

It is observed that his juridical thinking is far ahead of the time he lived and therefore it is not a panegyric or exaggerative statement to say that he should be recognised as one of the earliest proponents of IHL in the history of human civilisation.

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Recognition of the Jurisdiction of the International Criminal Court as a Measure to Ensure the Application of International Humanitarian Law: Example of Armenia

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This paper reviews the definition of international humanitarian law, as well as the application of international humanitarian law by the International Criminal Court. The powers and activities of the International Criminal Court are examined. The scope of possible application of the principles and provisions of international humanitarian law by the International Criminal Court, as well as the modalities of such application, is revealed. The article analyses changes in Armenian legislation after the ratification of the Rome Statute and focuses on the fact that after the ratification of the Rome Statute, which is a significant step forward for the security of Armenia, Armenia (Centre for Truth and Justice) requested the International Criminal Court Prosecutor to initiate a preliminary examination of the ongoing genocide committed by Azerbaijan's Armed Forces against the ethnic Armenians within the territory of Armenia. Besides this, the analysis of the procedural position of the International Criminal Court Prosecutor in the system of international justice is carried out. The main tasks and fundamental role of the Prosecutor's office in the investigation or prosecution of international crimes are investigated.

Keywords: *International Criminal Court; International Humanitarian Law; Rome Statute; ratification; preliminary examination.*

Introduction

International Humanitarian Law (hereinafter IHL) is the provisions and principles of international law that limit the use of violence during armed conflicts to humanise armed conflicts. That is, this law is applicable during armed conflicts and is aimed at reducing the disasters caused by them. It is worth noting that IHL law means a set of legal provisions binding on states that are aimed at protecting victims of armed conflicts of an international and non-international nature and limiting the means and methods of warfare. Firstly, this branch of law protects persons who do not take part in hostilities. Second, IHL prohibits means and methods of warfare that do not distinguish between combatants and non-combatants, as well as those that cause excessive injury. The modern concept of IHL is "*the extension of international legal responsibility for war crimes, crimes*

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against humanity committed during armed conflicts of both an international and non-international nature" [1].

The Relationship Between International Humanitarian Law and International Criminal Court

One of the aspects of international legal reality in the field of IHL is its application by the International Criminal Court (hereinafter ICC). The adoption of the Rome Statute (hereinafter the Statute) of the ICC and the creation of the first-ever permanent body of international criminal justice clearly emphasise the real existence in international law of the institution of individual criminal responsibility for serious violations of IHL. Article 8 of the Statute, which codifies war crimes under international law, is the source of IHL. The creation of the ICC is directly related to the content of the provisions of IHL and the court's qualification of the commission of war crimes as serious violations of this law.

The Statute codifies a certain part of the provisions of IHL. The development of IHL was facilitated by the content of Articles 5-8 of the Statute, which lists those acts for which ICC has the right to prosecute relevant persons. But the Statute not only codifies already recognised provisions but also develops their content. The most important achievement is that aggression and genocide are included among the acts for which individuals will be prosecuted by this court. This is of fundamental importance, since aggression, namely the first initiation of hostilities, in practice underlies most gross violations of IHL. Evidence of the development of IHL is the inclusion in the text of the Statute of grounds for exemption from criminal liability. It is crucial that the rules of the Statute, which provide grounds for exemption from liability for the commission of international crimes, must be taken into account when determining the individual responsibility of individuals for these crimes. The ICC creates additional guarantees of compliance with the provisions of IHL by high-ranking persons who have immunity from criminal prosecution at the national level[2].

The practice of the ICC is extremely important for defining the legal framework of IHL. There is a direct connection between the subject of legal regulation of IHL and the goals set for the ICC, which is designed to ensure the qualified application of IHL. Its decisions are undoubtedly a valuable additional means of establishing whether a particular rule of law exists or not, as well as determining its content and limits of action. Individuals are tried before the ICC and must bear international responsibility for the crimes they have committed, recognised as such by international law. The ICC is based on the presumption of individual criminal responsibility; individuals who have committed acts that are defined as criminal in international law are subject to its jurisdiction. It should be noted that the establishment of international criminal courts is directly related to the content of IHL and the qualification of its serious violations as war crimes[3].

[1]Safiullina (2003).
[2]Volova (2011).
[3]Gutierrez Posse (2006).

The ICC deals with the consequences of serious violations of IHL, and for a branch of international law that pursues humane goals and constantly experiences flagrant violations of its provisions, any decisions of international justice bodies confirming its significance are extremely important. The ICC is an independent international judicial institution, capable of determining the limits of its competence, which means that it has a "competence de la competence" and is not associated with the practice of any other judicial institutions.

Thus, we can conclude that ICC was created to protect and develop IHL and the results of its activities will directly influence the authority of the mentioned area of law.

Application of IHL by ICC and Literature Review

Concerning the procedure for the application by ICC of the principles and provisions of IHL, the additional, subsidiary nature of the legal provisions constituting these branches of public international law in relation directly to the provisions of the Statute is obvious. Regarding the scope of use of the principles and provisions of IHL, it is important to highlight several significant areas that objectively imply such application, which are the following: determining of the contextual element of international crimes falling within the jurisdiction of the ICC, defining and clarifying the content of concepts related to the objective side of committed (being committed) international crimes that fall under the jurisdiction of the ICC, resolving issues related to the transfer of persons who have committed crimes falling under the jurisdiction of the ICC by states that are not parties to the Statute to ICC for the administration of justice over them, determining the gravity of the crimes committed, as well as aggravating and mitigating circumstances, primarily when the ICC assigns specific punishment to persons found guilty of crimes falling under its jurisdiction, and resolving issues related to the execution of punishment, as well as preventive measures against persons accused of committing crimes within the jurisdiction of ICC.

Determining the Contextual Element of International Crimes falling within the Jurisdiction of the ICC

The term "contextual element" is used in the science of international criminal law to denote the connection of the crime with the circumstances qualifying it as an international criminal act. Thus, the contextual element of crimes against humanity is their connection with a widespread or systematic attack against any civilians; The contextual element of war crimes is the connection of these acts with an armed conflict. This element is often decisive both for the correct qualification of crimes and for distinguishing one type of crime falling under the jurisdiction of the ICC from another. The above element allows not only to distinguish international crimes that fall under the jurisdiction of the ICC from ordinary crimes but also to differentiate crimes that have a very similar (if not

identical) objective side but relate to different categories of international criminal acts (in particular, crimes against humanity and war crimes).

The contextual element acquires particular significance for the qualification of war crimes committed only during an armed conflict[4]. At the same time, Art. 8 of the Statute distinguishes between crimes committed during armed conflicts of an international and non-international character. The appropriate qualification of an armed conflict is important for determining the "threshold of application" of the provisions of IHL to it, and, consequently, international criminal law (in terms of the commission of war crimes during a given conflict). Thus, concerning armed conflicts of an international nature, the rules of IHL apply from the beginning (legal or actual) to such an armed conflict[5]. Article 2 of the Geneva Conventions names the cases in which the provisions of the conventions will apply: declaration of war; another armed conflict arising between two or more states (even if one of them does not recognise the state of war); occupation of all or part of the territory of a state (even if this occupation does not meet any armed resistance). Commenting on this aspect of IHL, Werle noted that "*an interstate conflict occurs when a state uses military force directly against the internationally protected territory of another state*"[6].

The threshold for the application of IHL in the context of a non-international armed conflict is much higher. Clause 1 of Article 1 of the Additional Protocol to the Geneva Conventions, relative to the protection of victims of non-international armed conflicts (Protocol II), declares that the provisions of the protocol apply to all armed conflicts "*taking place in the territory of a High Contracting Party between its armed forces and anti-Government armed forces or other organised armed groups which, under responsible command, exercise such control over part of its territory as to enable them to carry out continuous and concerted action and to apply this Protocol*". However, paragraph 2 of Article 1 of Protocol II specifies that the provisions of an international legal act do not apply "*to cases of disruption of internal order and the emergence of a situation of internal tension, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, since these do not constitute armed conflicts*."

The wording of paragraph "f" of Article 8 of the Statute largely repeats the wording of Article 1 of Protocol II by mentioning that it applies to war crimes committed during a non-international armed conflict and falls within the jurisdiction of the ICC, somewhat expanding it. This provision of international criminal law does not require, in particular, mandatory control of non-governmental armed groups over part of the territory of the state in which an internal armed conflict is taking place and the presence of "responsible command" among non-governmental armed groups. The criteria that distinguish non-international armed conflicts from ordinary indiscriminate acts of violence are the organisation of armed groups and the duration of the armed conflict[7].

[4]Lyamin (2018).
[5]Lyamin (2018).
[6]Werle (2011).
[7]Lyamin (2018).

At the same time, the criteria outlined in the Statute objectively contain (with possible minor amendments) the signs of armed conflicts of a non-international nature, recorded in the treaty provisions of IHL. Thus, the duration of the conflict and the presence of organised armed non-governmental formations are unthinkable without the control of these formations over certain areas of the territory (even if located in unpopulated and inaccessible areas) for the location of military bases, weapons depots, military command, and control bodies, etc. The presence of a responsible command also be considered a sign of an armed conflict of a non-international nature, delimiting the specified conflict from "unrest, isolated and sporadic acts of violence and other acts of a similar nature." The actual autonomy of the field commanders of these formations does not contradict this criterion, since it does not cancel the organisational unity of the corresponding non-governmental armed formations, but only decentralises it. Thus, it can be stated that the principles and provisions of IHL are an auxiliary mechanism for determining the contextual element of war crimes, capable of assisting the ICC in their correct and reasonable qualification[8].

> *Defining and clarifying the content of concepts related to the objective side of committed (being committed) international crimes that fall under the jurisdiction of the ICC (for example, the concepts of combatant, occupation, distinctive emblems established by the Geneva Conventions, prohibited means and methods of warfare)*

Several elements of war crimes enshrined in Art. 8 of the Statute operate with the above concepts without revealing their content, which makes recourse to the provisions of IHL (which determine this content) inevitable and natural[9].

> *Resolving issues related to the transfer of persons who have committed crimes falling under the jurisdiction of the ICC by states that are not parties to the Statute to the hands of the ICC for the administration of justice to them*

Even though the rules of substantive international criminal law contained in these conventions are codified by the provisions of the Statute, they remain important in the implementation of international cooperation of the ICC with states that are not members of the Statute, especially on the issues of transferring to international justice persons accused of crimes, which the above-mentioned international legal acts deal with. These provisions oblige states either to carry out justice concerning these crimes themselves (which is fully consistent with the complementarity model of international criminal justice enshrined in the ICC Statute) or to hand over for justice the person accused of the relevant crimes guided by the principle of *aut dedere aut judicare* (either extradite or prosecute) - a legal obligation of states under public international law to prosecute persons who commit serious international crimes where no other state has requested extradition, an interested party (the ICC). The treaty provisions enshrined in the above-mentioned conventions have long since become generally accepted provisions of

[8]Lyamin (2018).
[9]Lyamin (2018).

international law, norms erga omnes[10]. Kartashkin, commenting on this legal reality (concerning the Convention on the Prevention and Punishment of the Crime of Genocide), states: "*Regardless of whether a particular state is a party to the Convention and whether its laws prohibit the commission of genocide, the persons guilty of this international crime, are subject to prosecution and punishment*"[11]. Accordingly, the provisions enshrined in these international legal acts become an effective mechanism for attracting states that are not parties to the Statute to cooperate with the ICC.

Determining the gravity of the crimes committed, as well as aggravating and mitigating circumstances, primarily when the ICC assigns specific punishment to persons found guilty of crimes falling under the jurisdiction of the ICC

The Statute outlines the criteria for sentencing by the court to a person found guilty of committing crimes within the jurisdiction of the ICC, according to which in determining the penalty, the court, following the Rules of Procedure and Evidence, takes into account such factors as the gravity of the crime and the identity of the convicted person. The criteria are somewhat detailed by Rule 145 of the Rules of Procedure and Evidence. However, this rule does not pretend to be an exhaustive list of circumstances that determine the severity of a particular crime. In paragraph "b" of Part 1 of the mentioned rule, which lists the aggravating circumstances of criminal acts falling under the jurisdiction of the ICC, subparagraph "VII" also includes "other circumstances that, although not listed above, are similar in nature to those mentioned"[12].

For the legal definition of "other circumstances", it is permissible to apply the principles and provisions of IHL and international human rights law. This is most relevant when considering violent crimes falling under the jurisdiction of the ICC, committed against certain vulnerable categories of persons who enjoy the greatest protection under international and national law: minors, people with disabilities, etc. Special protection of the rights of certain vulnerable categories of persons implies a greater degree of responsibility for criminal violation of the rights of these categories. The aggravating nature of criminal acts committed against representatives of vulnerable groups was pointed out by the Inter-American Commission on Human Rights. Thus, when considering the case *Valentina Rosendo Cantu and others vs. Mexico Commission* found that in cases of rape of indigenous women, the violence is exacerbated by their vulnerability as such[13].

The application in this regard of the principles and provisions under consideration can provide the Court with the necessary legal mechanisms for the legality and validity of the verdict and punishment. Thus, the 1974 Declaration on the Protection of Women and Children in Emergency Events and Armed Conflict

[10]A Latin phrase which means "towards all" or "towards everyone".
[11]Kartashkin (2009).
[12]Valeev, Tarkhanov & Kayumova (2010).
[13]Abashidze (2012).

proclaims "the need to provide special protection to women and children belonging to the civilian population".[14]

> *Resolving issues related to the execution of punishment, as well as preventive measures against persons accused of committing crimes within the jurisdiction of ICC*

The application of the principles and provisions of IHL by the ICC seems necessary in the implementation of the court's supervision over the implementation of the sentence and the conditions of deprivation of liberty. Clause 1 of Article 106 of the Statute states that the execution of custodial sentences shall be subject to the supervision of the court and shall be per widely accepted international treaty standards for the treatment of prisoners. In this regard, the International Covenant on Civil and Political Rights of 1966, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, and the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 should be highlighted[15].

Ratification of the Statute and Recognition of the Jurisdiction of the International Criminal Court by the Republic of Armenia (Armenia)

On 14 November 2023, Armenia formally deposited the instrument of ratification of the Statute and the Statute entered into force on 1 February 2024. Armenia becomes the 124th State Party to join the Statute, and the 19th State from the Eastern European group to do so. The adoption of the Statute was due to the need to solve serious international problems[16]. The ICC, the first permanent body of international criminal justice, is closely linked to the expectations of the international community in the fight against impunity in the context of overall efforts to maintain international peace and security, resolve existing conflicts, and prevent new sources of tension. The necessity and urgency of the ratification of the Statute and the recognition of ICC's jurisdiction are determined by the law adopted by the parliament of Armenia. The National Assembly of Armenia has mentioned that in 2021 since May, the armed forces of Azerbaijan invaded the sovereign territory of Armenia by carrying out military aggression against Armenia and continue to remain in different parts of the sovereign territory of Armenia. Then, in 2022 on September 13-14, a new large-scale military aggression was carried out by the armed forces of Azerbaijan in the direction of different parts of the sovereign territory of the RA, which led to hundreds of victims among the armed forces and the civilian population, and during which the most serious war crimes were committed. Moreover, judging by the behaviour and

[14]Lyamin (2018).
[15]Lyamin (2018).
[16]https://www.icc-cpi.int/news/international-criminal-court-welcomes-armenia-new-state-party#:~:text=Background%3A%20On%2014%20November%202023,European%20group%20to%20do%20so

bellicose statements made by Azerbaijan, the risk of new military aggression against Armenia by Azerbaijan remains high. In these conditions, the early ratification of the ICC Statute by Armenia is crucial, because after the ratification of the Statute by RA, any crime committed by the Armed Forces of Azerbaijan on the territory of Armenia, including war crimes, will be subject to the jurisdiction of the ICC, which will be a deterrent for Azerbaijan.

Retrospective recognition of the jurisdiction of the ICC is also important, which will enable the jurisdiction of the ICC to be extended to the crimes provided by the Statute already committed by Azerbaijan. However, the application of this instrument will be more effective when combined with the ratification of the Statute by Armenia[17].

Because after ratification the Statute becomes part of the legal system of Armenia, the question of so-called self-executing and non-self-executing international legal provisions inevitably arises. Article 14 of the Statute empowers member states of the ICC to request the prosecutor to open an investigation into international crimes within the court's jurisdiction. Questions about which state body, through what channels, and under what procedure can apply to the ICC, require additional legal regulation. To solve these issues, Armenia has adopted the draft law on the cooperation of Armenia with the ICC, which regulates the principles of cooperation of Armenia with the International Criminal Court, the bodies authorized for cooperation and their functions, as well as the forms of legal assistance during cooperation.

Questions need to be clarified during the Application of the Statute by Armenia

The first question that needs to be clarified is the interrelation between Article 1 of the Statute and Articles 162 and 163 of the Constitution of Armenia (Constitution). The Statute complements national criminal justice authorities (Article 1 of the Statute). This provision of the Statute means recognition, along with the jurisdiction of national judicial authorities, the jurisdiction of another (international) judicial body. According to part 1 of Article 162 of the Constitution, justice in Armenia is administered only by courts following the Constitution and laws. According to parts 1 of Article 163 of the Constitution, in Armenia, there are the Constitutional Court, the Court of Cassation, the appeal courts, the courts of first instance of general jurisdiction, as well as the administrative court. Does the Constitution provide for the opportunity to create courts in the order of concluding an international treaty, making it possible to supplement the system of judicial bodies exercising criminal jurisdiction provided by the Constitution with an international judicial body of criminal jurisdiction? This is a question that needs to be clarified.

Seems difficult also the issue of interpretation and implementation of Article 27 of the Statute on bringing to criminal liability the head of state, head of

[17]http://parliament.am/drafts.php?sel=showdraft&DraftID=72101

government, and other senior officials of the state and Article 141 of the Constitution, which provides for a special procedure for removal from office of the President of Armenia, including in the event of committing a serious crime. The decision to remove from the office of the President based on the conclusion of the Constitutional Court is made by the National Assembly. There is a possibility that ICC will require, under Article 27 of the Statute, transferring of the head of state (the President) to its jurisdiction, and the Constitutional Court will not give the necessary conclusion or the National Assembly will not make appropriate decisions. Thus, a conflict may arise: on the one hand, the presence of national procedural provisions should not serve as an obstacle to the court exercising its jurisdiction, and on the other hand, there is a special procedure established by law for bringing senior officials to criminal liability, who have the right to demand its compliance.

The next issue concerns the coexistence of the constitutional provision that establishes the prohibition of repeated convictions for the same crime (Part 1 of Article 68 of the Constitution) and the provisions of Article 20 of the Statute, which establishes two exceptions to the non bis in idem rule: no person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the ICC concerning the same conduct unless the proceedings in the other court were to shield the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or otherwise were not conducted independently or impartially following the provisions of due process recognised by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice[18]. Paragraph 7 of Article 14 of the 1966 Covenant on Civil and Political Rights states that "no one shall be tried or punished a second time for a crime for which he has already been finally convicted or acquitted under the law and criminal procedure of each country." Does it mean that Article 20 of the Statute allows a repeated conviction for the same act, contrary to the universal international legal instrument establishing human rights? This is another issue that needs to be clarified.

Another issue that may arise during the application of the Statute in the Armenian context concerns the concepts of "surrender of persons to the Court" and "extradition". Article 55 of the Constitution enshrines the principle of non-extradition of its citizens. A citizen of Armenia cannot be extradited to a foreign state, except for the cases stipulated by international treaties ratified by Armenia. Thus, Armenian citizens cannot be extradited to another state, not to mention an international organisation. According to Article 89 of the Statute, the ICC may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in Article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. It should be noted that Article 102 of the Statute explains the terms used, according to which "surrender" means the delivering up of a person by a State to the ICC, according to this Statute, whereas "extradition" means the delivering up of a person by one State to another as

[18]chrome extension://efaidnbmnnnibpcajpcglclefindmkaj/https://legal.un.org/icc/statute/english/rome_statute(e).pdf.

provided by treaty, convention or national legislation. These give grounds to consider surrender of persons to the Court and extradition as independent institutions of international law.

Thus, we can conclude that the implementation of Article 89 of the Statute does not contradict the specified provision of the Constitution (Article 55), because this is not extradition in the sense of an international treaty.

Request to initiate a Preliminary Examination by ICC Prosecutor

The International Criminal Court has a full stage of initiating a criminal case, which is initiated by the Prosecutor. According to Article 15 of the Statute, the Prosecutor initiates a case on his initiative (proprio motu) based on available information about the offense. The Prosecutor of the ICC may initiate an investigation proprio motu based on information received from any reliable source regarding the commission of crimes within the jurisdiction of the Court (Articles 13(c) and 15). As such a reliable source, the Center for Truth and Justice (CFTJ) requested the ICC Prosecutor to initiate a preliminary examination of the ongoing genocide committed by Azerbaijan's Armed Forces under the leadership/direction of the President of Azerbaijan and its military leadership, against ethnic Armenians within the territory of Armenia. Taking into account the fact that the jurisdiction of the ICC extends to the crimes of genocide, war crimes, crime of aggression (since 2010), CFTJ communication requests the ICC Prosecutor to open a preliminary examination of the situation in Armenia since May 12, 2021, both to prevent and to punish the perpetrators of the genocide committed against ethnic Armenians under the Convention on the Prevention and Punishment of the Crime of Genocide, Article II(c), deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part[19].

Initiating an investigation by the prosecutor is an important power that will improve the perception of the Prosecutor Office of ICC as an "independent" agency. The prosecutor may conduct a formal "Motu proprio" investigation only with the approval of the Pre-Trial Chamber of the Court. The Office of the Prosecutor operates independently as a separate body from the court and, therefore, its members exercise their functions without any external influence, inducement, pressure, threat, or interference, directly or indirectly empowering the prosecutor to ensure the complete independence of employees. The Office of the Prosecutor is mandated to act objectively in investigating both indictive and exculpatory circumstances and the ICC Prosecutor is expected to act impartially and conduct investigations with a view to the truth and in the interests of justice. When performing his duties, the prosecutor observes confidentiality requirements (which do not end with termination of service); in particular, he/she must not disclose confidential information or disclose the contents of material considered less sensitive by the international criminal court, unless authorised by the international criminal court. The prosecutor is a party, but it is recognised that he

[19]https://www.cftjustice.org/wp-content/uploads/2024/04/ICC-Communication-NEW-IND.pdf

represents the interests of the international community and must act objectively and fairly. When conducting investigation and supervision at the first stage of criminal proceedings, prosecutors are the main defenders of human rights, and this important role must be carried out throughout the process, limiting the risk of undue political interference in the way they exercise their powers[20].

The independence of the ICC Prosecutor's office is a consequence of the independent judiciary. After the initiation of an investigation, the Prosecutor approaches the Pre-Trial Chamber, which decides to issue a warrant for the arrest and transfer of a person suspected of having committed a crime within the jurisdiction of the ICC. When a person is brought before the Court, whether voluntarily or by a warrant, the Pre-Trial Chamber must hold a hearing to ensure that the Prosecutor has sufficient evidence to prove each charge (Article 61(5)).

Conclusion

The application by the ICC of the principles and provisions of IHL is objectively subsidiary. Without making adjustments and additions to the specific elements of crimes falling under the jurisdiction of the ICC, these international legal principles and provisions can help the ICC follow the generally accepted understanding of the special terminology used in the provisions of the Statute, in a legally correct assessment of contextual circumstances (the contextual element) and in determining the degree of gravity certain criminal acts.

Ratification of the Statute is a manifestation of solidarity with the victims of genocide committed by Azerbaijan’s Armed Forces since May 12, 2021, and a step towards a safe future, both in Armenia and in the world as a whole. The jurisdiction of the ICC will ensure the security of the territory remaining under the control of the Armenian authorities from new aggressions of Azerbaijan and is a guarantee that with accession to the ICC, the level of security and inviolability of the territorial integrity of Armenia will be ensured.

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Conventions and a Declaration

Convention for the Protection of Human Rights and Fundamental Freedoms of 1950.

Convention on the Prevention and Punishment of the Crime of Genocide 1948, entered into force in 1951.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.

Declaration on the Protection of Women and Children in Emergency Events and Armed Conflict of 1974.

International Covenant on Civil and Political Rights of 1966.

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Some Developments and Vulnerabilities in the Child Rights Protection System under the Umbrella of the European Family

*By Mihaela-Adriana Oprescu**

Bearing in mind that the European Economic Community was originally a purely economic construction, there is no consistent and relevant degree of conventionality in the relationship between the EU, on the one hand, and the family, in all its configuration, on the other. However, indirectly, through its own policies, the Union has shaped certain aspects of the concept of family, the free movement of European citizens and their family members being a case in point. In this study we aim to determine to what extent we can speak of the existence of the concept of the European family and to present the European standards that circumscribe the child in a family unit, including the adaptation of some "classic" rights of EU law to best suit the specific interests and needs of the child. Last but not least, we aim to present some vulnerabilities in the European system of protection of children's rights, caused either by inconsistency of the European legislator or by a lack of refinement in the interpretation of legal provisions relating to fundamental rights.

Keywords: *Child; Freedom of movement; Citizenship; Family member*

Introduction

In Europe, and not only in Europe, the concept of family life has undergone radical transformations in recent decades[1], its field of application has been extended to coordinates that make it almost impossible to standardise a set of unanimously accepted criteria, such as to configure, as such, the notion of family. Suffice it to consider the heterogeneity of family trajectories that can be found in the contexts generated by marriage or civil partnerships, in couple relationships not covered by conventionality (cohabitation), in parental relationships based or not on the existence of a bio-genetic link, in the complex circle of families with step-parents or step-children, etc.

In addition, the exercise of the rights deriving from the concept of European citizenship, in particular the right to move and reside freely within the EU, introduced by the Maastricht Treaty, has profound repercussions on the natural and harmonious exercise of family relationships. The freedom of movement guaranteed under EU law for EU citizens has not only created the preconditions for relocating family life to a country other than their country of origin, but has also dismantled the classic image of the family where the members live "all under

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[1]Stark (2005) at 1-2.

one roof, in an EU Member State". It is becoming increasingly common for the family to be in a close-knit family only occasionally, because parents and minor children, the latter left in the care of others (grandparents, aunts, etc.), live mostly in different Member States. The European perspective, built around freedom of movement, has implied a paradigm shift from "all under one roof in one EU Member State" to "together under several roofs in several countries of residence".

In this context, some natural questions arise: Can we speak of the existence of the concept of the European family and, if so, what are the coordinates that shape its architecture? What is the place of the child within this European family and how effective is the child protection system under the umbrella of such a family? To what extent is the European legislature's concern to take children's rights into account in shaping the substance of the rules of European law sufficient to establish a sufficient system of protection? These are the questions to which we will try to find an answer, which will be reflected in the structure of this research.

Literature Review

An analysis of the specialised literature[2] and a careful reading of the primary sources of EU law, with reference to the origins of the European construction, reveals that the founding treaties make no reference to the concepts of family or family life, which is understandable since the premise of the Community architecture was, in essence, the realisation of a purely economic construction. Neither did the substantial reform carried out with the entry into force of the Maastricht Treaty (1992) bring about a radical paradigm shift, since the rules introduced for individuals have had repercussions mainly on individual social destiny.

In essence, EU law preserves the pragmatic interest of the individual, not the family circle.[3] Illustrative in this respect is the fact that the right to free movement and residence or the electoral rights in the State of residence, provided for in Article 20(2) of the Treaty on the Functioning of the European Union (hereinafter TFEU), are guaranteed to the European citizen and not to his family members. The right not to be treated in a discriminatory manner "on grounds of nationality or nationality"[4] also applies to European citizens, just as the minimum standard of social protection is guaranteed to European workers. There is therefore no constant and relevant degree of conventionality in the relationship between the EU, on the one hand, and the family in its entirety, on the other, which is justified by the limits imposed by the application of the principle of conferral of competences. Consequently, we cannot speak of a substantive harmonisation of family law at European level, which is why elements of the lexical field of the family, such as the substantive conditions of marriage, adoption, the effects of divorce, the

[2]Widiez (2020) at 120; Pataut (2020) at 93; Monedero (2019) at 87; Caracciolo di Torella & Masselot (2010) at 25-26.
[3]Fulchiron (2014) at 171.
[4]Article 18 of TFEU.

conditions for establishing maternity/ paternity, etc., remain exclusively subject to national law.

Starting from this premise, we can observe that the intervention of the European legislator is dissipated and can be observed only in cases where the need to protect family ties legitimises or ensures the effective application of the EU regulatory framework. Illustrative in this respect is the diversity of secondary law instruments that are grafted on the social reality of the family relationship, for example: Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction[5]; Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations[6]; Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States[7]; Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification[8]; Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings[9]; Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers[10]; Regulation (EU) no. 604/2013 of the European Parliament and of the Council of June 26, 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person[11], etc.

As a result, we are witnessing a fragmented approach to the concept of the family, depending on the specific features of the European legislator's intervention. Some authors focused exclusively on the rules of private international law and provided extensive analysis of Council Regulation (EC) No 2201/2003 of November 27, 2003[12], while the attention of others was directed to the right to free movement[13], respectively the right to family reunification[14]. There are also authors whose studies aim at analysing in depth the implications of family relationships in immigration matters[15], in particular with regard to the determination of the

[5]Published in Of. J. L, 178, 02/07/2019.
[6]Published in Of. J. L. 7, 10.1.2009.
[7]Published in Of. J. L. 158, 30.4.2004.
[8]Published in Of. J. L 251, 03/10/2003.
[9]Published in Of. J. L 132/1, 21.05.2016.
[10]Published in Of. J. L128/8, 30.04.2014.
[11]Published in Of. J. L.180/31, 29.06.2013.
[12]Beilfuss, Carpaneto, Kruger, Pretelli & Župan (2023).
[13]Ismaïli (2019) at 91-131.
[14]Deana (2019) at 32-37; Friedery (2019) at 6-17.
[15]Rodrigues (2019) at 55-72; Zedalis & Weudland (2024) at 547-612; Frasca & Carlier (2023) at 345- 390.

Member State responsible for dealing with an application for international protection lodged by a minor[16].

Other studies focus on how the case law of the Court of Justice of the European Union (CJEU) or the European Court of Human Rights (ECtHR)[17] reflects a particular fundamental right of the child, such as the right to be heard[18] or the right to have personal contact with parents[19] , or a comparative case law overview of such a right[20].

In this study we will try to highlight the consequences of this fragmented approach on the concept of the European family, to which the European legislator has provided an extremely flexible legal framework, on variable coordinates, created in particular by procedural rules designed to protect the unity of the family unit.

Methodology

In methodological terms, this study combines a descriptive-interpretative and comparative approach, which is revealed by the analysis of European primary and secondary legislation with an impact on the system of protection of children's rights and the European family. Accordingly, we aim to identify, firstly, the legal elements that shape the concept of the European family and then, using the comparative method, possible normative inconsistencies in European legislative acts that either highlight the vulnerabilities of the child protection system within the European family or, due to the transposition process, allow for non-uniform approaches in this area.

In addition, using the interpretative method, this study devotes attention to several judgments of the Court of Justice of the European Union (CJEU), which highlight the adjustment of key concepts of European law with the precisely determined aim of preserving family unity.

A New Concept-European Family?

The starting point for this study is that the family, although exogenous to EU law, could not remain in integrum outside the scope of its regulation. It is self-evident that, as long as any legal rule has its source in a social need, the European legislator, concerned as he is about the European worker and the European citizen in general, could not ignore the social reality[21] of belonging to a family circle. How could it be possible to speak of removing all barriers to the free movement of European workers when they were not allowed to be accompanied by their closest family members in order to carry out an economic activity in the Union area? Or

[16]Peers (2016) at 519-533; Klaassen & Rodrigues (2017) at 191-218; Smyth (2009).
[17]Coester-Waltjen (2016) at 49-95.
[18]Bergamini (2019) at 15-17; Parkes (2013).
[19]Tryfonidou (2019) at 78-82.
[20]Georgios (2021) at 161-189.
[21]For a sociological perspective on the family, see Boghirnea (2023).

how would it be possible to exercise rights that are grafted onto freedom of movement and residence, such as the right to vote and stand for election in local elections in the State of residence, when, because of a total disregard for the fact that the citizen is not part of a family circle, he would be discouraged from leaving his State of origin? Or how attractive and effective would a social policy be which aims to modernise the social system and invest in people, while at the same time assuming a natural combination of work and family life, when silence on the part of the law would lead to the establishment of certain implicit barriers affecting the dynamics of the labour market? Thus, without benefiting from a legal definition[22] and rules to give a stable shape to its configuration and effects, but bearing the stamp of social reality, the family, understood as a mosaic of emotional and patrimonial relationships, not necessarily grafted on the validity of legal ties from the perspective of all the national rights involved[23], could not be ignored by EU law. Illustrative in this respect is the judgment of the CJEU in the Coman case[24], which obliges a Member State which not only prohibits, but does not recognise, legal marriages concluded between persons of the same sex abroad (in this case Romania), to recognise the limited effects of this type of marriage, solely in terms of the implications for the right to free movement within the EU. However, the consequences of establishing such a couple on the territory of a Member State which does not recognise same-sex marriage remain to be discussed, as such an interpretation is likely to create the paradoxical situation where one and the same person (the homosexual spouse, a family member of the EU citizen) "is treated simultaneously as a single and married person, depending on the applicable legal system"[25]

The above shows, therefore, that the family created by EU law in contexts with cross- border elements is emancipated from the national understanding of the concept, but does not have a well-defined content and does not benefit from any express rules on the conditions of substance or form. It can be portrayed exclusively as a mixture of personal and property ties (grafted onto a legal relationship established under national law) which enjoy legal protection under specific policies designed to safeguard, in particular, the free movement of persons and judgments within the European territory[26].

Children and their Rights

There is no doubt that the European legislator, from the perspective of both primary and secondary law, has set out to establish a system for the protection of children's rights.

[22]See also De Baere & Gutman (2016).
[23]CJEU, Case C-673/16 Coman (2018).
[24]Idem.
[25]At length see Oprescu (2022) at 345-358.
[26]The literature has revealed in this respect that "at least three particular branches of European law shape the European perspective on the family: EU social policy, the free movement of EU citizens and their family members (the so-called right to family reunification) and, last but not least, private international law". See Pataut (2020) at 102.

Thus, the second sentence of Article 3(3) TFEU states that "*The Union shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child*", and paragraph 5 of the same article states that "*The Union shall [...] contribute [...] to the protection of human rights and in particular children's rights [...]*".

There are also references to direct and indirect mechanisms for the protection of children in other provisions of the TFEU, such as Article 79(2), according to which the European Parliament and the Council may adopt legislative measures "*on the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including for the purpose of family reunification*" (lit. a) and "*to combat trafficking in persons, especially women and children*" (lit. d), respectively Article 83(1) of the same legislative instrument, which creates the legal basis for the adoption of directives which may establish "*minimum rules concerning the definition of criminal offences and sanctions in areas of crime of particular seriousness with a cross-border dimension*", such as "*trafficking in human beings and sexual exploitation of women and children*".

It cannot be overlooked either that following the entry into force of the Lisbon Treaty in December 2009, the Charter of Fundamental Rights of the European Union (hereinafter - the Charter) became legally binding in 2016, becoming an integral part of European primary law. Clearly, the provisions of the Charter, within the scope of European law, also cover minor children as subjects of law. Thus, in Article 24 of the Charter, under the marginal heading "Rights of the child", we find the provision according to which "*Children have the right to such protection and care as is necessary for their well-being. They may express their views freely. In all actions concerning children, whether undertaken by public authorities or private institutions, the best interests of the child shall be a primary consideration (1). Every child shall have the right to maintain on a regular basis personal relations and direct contact with both parents, unless these are contrary to his or her best interests (3)*". Clearly, it is not only this article that concerns children, as it applies in conjunction with the other provisions of the Charter, such as the right to integrity (Art. 3), the prohibition of torture and inhuman or degrading treatment or punishment (Art. 4), the right to education (Art. 14), the prohibition of all forms of discrimination (Art. 217), etc.[27]

It can be seen from the above that the European system of child protection, built under the auspices of the Charter, is essentially a particularised replica of the general system of human rights protection: in essence, the child becomes the subject of protection, as it is recognised, de jure, the status of person, of human being who, by the mere fact of birth, benefits from rights that must be guaranteed and respected[28].

In approaching the present study, we propose, however, to limit the research exclusively to those fundamental rights that highlight the reverberations of the child's circumscription in a family circle (nuclear or extended family). In this

[27]Bergamini (2019) at 9.
[28]Oprescu (2021) at 391.

respect, we will observe the binary intervention of the European legislator by: (A) enshrining fundamental rights specific to the condition of the child, with the aim of ensuring the effective application of European secondary law instruments, and (B) instrumentalizing classic European rights to protect other fundamental rights of the child, precisely in order to safeguard family stability and unity, which cannot be ignored.

Speaking of the fundamental rights of the child, a reading of the provisions of the Charter quickly reveals the natural provision contained in Article 7, which concerns the right to respect for family life, thus guaranteeing the right of the child not to be separated from his or her parents. In addition, Article 24 of the Charter, referred to above, also mentions: the right of the child to express his or her views "freely", which shall be considered "in accordance with the age and maturity of the child" (para. 1); the paramountcy of the best interests of the child in all actions concerning him or her (para. 2); the right of the child to maintain on a regular basis personal relations and direct contact with both parents (para. 3).

It should be made clear that, as stated in Article 51(1) of the Charter, its provisions "*are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law*"[29]. In the same sense, in accordance with Art. 51 para. (1), second sentence, the addressees of the Charter "*respect the rights and principles and promote their application in accordance with the powers conferred on them by the Treaties*". Similarly, according to Article 51(2) of the Charter, it "*shall not extend the scope of Union law beyond the competences of the Union, shall not create any new power or task for the Union and shall not modify powers and tasks established by the Treaties*".

In principle, therefore, the provisions of the Charter are directly applicable in national law[30] and enjoy direct effect[31], but only in those situations and areas where Member States are acting in the application of EU law[32], e.g. free movement of persons, asylum, consumer protection, judicial cooperation, etc[33].

Although at first sight, given the limits of the European Union's powers in relation to the concept of "family" or "family relationship", the provisions of the Charter appear rather proclamatory, in reality they underpin the effectiveness of numerous secondary law instruments, which, for example, incorporate provisions on the right of the child to be heard or to have his or her best interests taken into account or the right to have personal ties with his or her parents.

Turning our attention to Council Regulation (EU) 2019/1111 of June 25, 2019[34] , we will pay attention to the provisions on the right of the child to be heard. The premise we will consider is that despite the generous commitments in the Preamble (para. 39) which summarises that "the opportunity of the child to

[29]On the principle of subsidiarity, see Van Raepenbusch (2014) at 142-148.
[30]See Fabian (2018) at 97-102; Craig & de Búrca (2017) at 445-449.
[31]See Schütze (2015) at 77-87; Foster (2016) at 205-209.
[32]Vrabie (2017) at 9-10.
[33]Oprescu (2021) at 391.
[34]Published in Of.J. L, 178, 02/07/2019.

express his or her views freely, in accordance with Article 24(1) of the Charter and in the light of Article 12 of the UN Convention on the Rights of the Child, plays an important role in the application of this Regulation", the right of the child to be heard is not impeccably articulated in the overall jurisdictional proceedings concerned.

Thus, in this Regulation, we will find explicit requirements for hearing the child in the following situations:

a) where a Member State exercises jurisdiction in accordance with the Regulation in a case concerning parental responsibility;
b) in the case of return proceedings under the 1980 Hague Convention, where the child under the age of 16 "has been wrongfully removed to or retained in a Member State other than the one where the child was habitually resident immediately before the wrongful removal or retention" (Article 22 of the Regulation);
c) in the context of the refusal to recognise a judgment on parental responsibility, if it was given without giving the child "the opportunity to express his or her views", which denotes a procedural deficiency that deprives the judgment of effectiveness in the European area (Article 39(2) of the Regulation);
d) in the matter of issuing the special certificate on the rights of access or the certificate on the return of the child, which is issued by the court of origin whose judgment on the rights of access/return of the child is to be recognised in another Member State. The court of origin shall issue the certificate only if, inter alia, according to Article 47(3) of the Regulation, "the child has been given an opportunity to express his or her views".

With regard to the assumptions in lit. c) and d), it can be seen that the Regulation refers to "*the child's opportunity to express his or her views* " and not to respect for the child's right to be heard, the terminology used leaving room for interpretation as to whether the hearing is mandatory or, on the contrary, suppletive, and as to who is the person who has to initiate the hearing. In other words, does the infringement of the right to be heard occur only when the child has expressly requested it and the court has arbitrarily refused? Does or doesn't the court have to inform the child that he or she has this right? Moreover, this vagueness is apparent from the very content of Article 21 of the Regulation, which, although it uses the marginal heading "*The **right** of the child to express his or her views*", still refers to "*the […**] possibility** of expressing his or her views*".

There are other sticking points in this respect. It is true that this regulation concerns the right to be heard from a procedural rather than a substantive perspective, which explains the European legislator's reluctance to define the content of this right more precisely and, consequently, the recognition of a wide margin of discretion in favour of the national court applying national procedural law. However, it cannot go unnoticed that, in the context in which a court of a Member State may refuse to recognise a judgment on parental responsibility where it was given without the child having been given an opportunity to be heard (except where the subject-matter of the case concerned the child's property or

where the urgency of the case justifies the refusal of a hearing or hearing-hypotheses referred to in Article 39(2) of the Regulation), the omission of legal details in outlining the "right of the child to be heard" may lead to a lack of uniformity in case-law.

Thus, analysing the content of Article 21 of the Regulation, we note that the "right to express his or her views" is guaranteed only for "the child who is capable of forming his or her own views". But what does it mean that a child is capable of forming his or her own views? Is this requirement conditional on the existence of discernment or not? If the answer is in the affirmative, can the procedural defect of the child's failure to be heard be covered by the fact that the child lacked discernment anyway? This ambiguity in Article 21 of the Regulation is of relevance in the context of the fact that not all the laws of the Member States make the exercise of the child's right to be heard subject to the child's discernment. For instance, Article 388-1 of the French Civil Code lays down the following rules regarding the hearing of a minor "capable of discernment" (regardless of age) in any proceedings concerning him or her: he or she has the right to be heard if he or she so requests and may also refuse to be heard, in which case the judge must assess the merits of such a refusal; the judge is obliged to inform the minor that he or she has the right to be heard. Romanian law, however, is quite different. According to Article 264 of the Romanian Civil Code, the obligation to hear the child's opinion is not conditional on the existence of discernment and exists when the minor has reached the age of 10. Until this age, the child's hearing is in fact a discretionary right of the judicial or administrative authorities entrusted with taking a measure concerning the child.

Consequently, precisely in order to ensure uniformity in case-law, we believe that more detailed rules on the hearing of the child would be necessary, covering, among other things, the minimum age from which the child's right to be heard cannot be disregarded, the grounds that may justify disregarding the child's right to be heard, the introduction of a restrictive interpretation of the impossibility of hearing the child, the need to give reasons for the impossibility of hearing the child, the obligation to inform the child not only of the right to be heard, but also of the consequences of the hearing and how the information provided will be used, etc.

Another aspect that should be noted is that the fragmentary intervention of the European legislator in the family field highlights the lack of consistency on the subject of protection. Thus, under Article 2(2)(c) of Directive 2004/38, "direct descendants aged 21 or over or dependent on him (the EU citizen) and direct descendants of his spouse or partner" are considered to be family members of the EU citizen and, consequently, beneficiaries of freedom of movement. By contrast, Article 4(1) of Directive 2003/86[35] uses a restrictive definition (it covers the nuclear family with minor children)[36] and it circumscribes to the family member of the sponsor only the minor child who has not reached the age of majority and has not been emancipated by marriage (marriageable majority). This difference in approach highlights the more favourable treatment of the child of an EU citizen

[35] Published in Of. J, L. 158, 30.4.2004.
[36] Uçarer (2009) at 70-71.

compared to the child of a non-EU citizen seeking family reunification. In a school hypothetical situation, the child who has recently come of age (up to the age of 21) and is a descendant of the EU citizen can enjoy the right to free movement within the EU, whereas the child who is 18 years and 1 month old and is a descendant of a third-country national who has already had a residence permit for at least 1 year is not entitled to reside in the EU with his/her parent. In this last hypothesis, the host Member State has a certain margin of discretion as long as it can, and is not obliged to, authorise family reunification.

(B) Speaking of the preservation of family unity, the role of the case-law of the CJEU, which has used classic European rights, such as the right to freedom of movement, to protect the right to family life, cannot go unnoticed in this respect.

As regards the right to move and reside freely within the territory of the Member States, governed by Article 20 (2) (a) in conjunction with Article 21(1) TFEU, it is recognised, under the terms of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 (Directive)[37], both for the European citizen and for his/her family members.

It is important to emphasise that the Directive outlines the composition of the family of the European citizen, among its members being "the direct descendants aged 21 or over or dependent on him (the European citizen - s.n.), as well as the direct descendants of his spouse or partner" (Article 2(2)(c) of the Directive). We note that EU law has therefore defined the parental relationship in much broader terms than national law. The following types of family relationship fall within the scope of the parental relationship protected by European law:

- the direct family relationship, based on natural or civil (in the case of adoption) kinship between the EU citizen and his/her direct descendants who are aged 21 or over or are dependent on the EU citizen;
- indirect family relationship, built on the relationship between the EU citizen step-parent and the minor child of the spouse or partner; in such a hypothesis, the family relationship is not directly based on a legal relationship between the step-parent and the step-child, but indirectly on the marital relationship or partnership of the EU citizen with a non-EU citizen who has children from another marriage or out of wedlock or adopted.
- the indirect family relationship, based on the relationship between the EU citizen and the direct adult descendants of the spouse or partner.

In addition to these, there are other sui-generis forms of family relationships, the *SM* judgment being illustrative in this respect[38]. In that case, the question was raised whether a minor in respect of whom guardianship has been granted to European citizens on the basis of the Algerian measure "al kafalah"[39] can be regarded as a direct descendant within the meaning of Article 2(2)(c) of the Directive. The reasoning of the judgment reveals that the placement of a child in

[37] Published in Of. J. L 251, 03/10/2003
[38] CJEU, Case C-129/18 (2019).
[39] At length on this regime, see Malaeb (2015) at 307-342.

"al kafalah" guardianship has no equivalent in the legislation of the Member States, such regime being *sui-generis*, at the confluence of adoption, guardianship and foster care[40]. Thus, one of the particularities of this scheme is that although there is no replacement of natural filiation by adoptive filiation, the child-natural parent relationship remaining intact (para. 56 of the judgment), the child nevertheless takes the name of the guardian. The preservation of natural parentage also explains the temporary and revocable nature of the regime: "al kafalah" ceases when the child reaches the age of majority and can be revoked at the express request of the biological parents (para. 45 of the judgment). Moreover, the Algerian regime has no implications in the sphere of succession, the child not being considered as successor to his guardian (para. 45). Essentially, placing a child under this regime obliges the guardian to take care of the child's maintenance and day-to-day protection until the child reaches the age of majority.

The facts set out in paragraphs 23 to 42 of the judgment reveal the situation of a minor girl placed under "al kafalah" guardianship by a French couple with the right of permanent residence in the United Kingdom. In an attempt to regulate her right of residence, the minor SM applied to the British immigration authorities for leave to enter, which was refused on the ground that a minor placed under the "al kafalah" guardianship of a European citizen cannot be considered a direct descendant within the meaning of the Directive. Obviously, the refusal by the UK authorities led to procedural steps before the UK courts, which resulted in the referring court asking a number of questions to the Luxembourg court. The cornerstone of this case was the very concept of direct descendant referred to in Article 2(2)(c) of the Directive, namely the extent to which it also covers a child placed under the "al kafalah" guardianship of a European citizen who has exercised his or her right to free movement within the EU.

In this case, it should be noted that the CJEU continues the series of reasoning by which it interprets concepts in the lexical field of the family uniformly by resorting to autonomous notions. Thus, by way of interpretation, the CJEU provides a definition of the concept of direct descendant in the sense that it covers "both the biological child and the adopted child" of a European citizen (para. 54 of the judgment), excluding the child "placed under the legal guardianship of a Union citizen" (para. 55 of the judgment), as long as the filiation link is missing.

What is striking about this judgment is that the questions referred for a preliminary ruling concerned exclusively the interpretation of Article 2(2)(c) of the Directive, and the Court's reasoning was not limited to formulating a specific answer to the question of law raising questions of interpretation. The CJEU went further and, grafting its reasoning onto the provisions relating to the fundamental rights of the child upheld by Art. 7 (right to family life) and Art. 24 para. 2 (the principle of the best interests of the child) of the Charter, gave the national court an interpretation of the provisions of Article 3(2)(a) of the Directive in such a way that the child can be circumscribed within the concept of "other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependents or members of

[40]Oprescu (2023) at 120.

the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen". Thinking pragmatically and humanely and allowing the national court to assess the consistency of the family relationship of dependency, the CJEU has given the only possible interpretation compatible with the system of protection of the rights of the child. Recognizing the right of the child to enter and reside in the EU territory together with the adult responsible for the exercise of parental responsibilities is in essence a guarantee that the fundamental rights of the child are preserved. This illustrates a paradigm shift by using the right to free movement to preserve the child's fundamental right to live within the family extensively shaped by the legislation of a non-EU state.

Conclusion

It can be observed that although there are numerous European legislative instruments that directly or indirectly concern the child, the family and family members, these concepts remain deeply rooted in the national law of the Member States. In the absence of European legal definitions and exhaustive elements that give them legal contours, the concepts of child or family are rather described in a particular way, adapted to the purpose of each derived European law instrument. The European directives do not tell us what a family is and what the nature of the legal relationship between its members is, but only indicate who the family members are and how the legal provisions should be applied, precisely in the light of the reality of the family.

In addition, the heterogeneity of family situations poses real challenges for the national authorities of the Member States, as the conceptual framework of family law is not harmonised at EU level. However, the common denominator in all these situations in which a decision has to be taken regarding a minor child anchored in a family unit is the preservation of the child's rights, particularly his or her best interests, including the need to provide the necessary framework for the child's personal ties with his or her parents or legal guardians. This is, moreover, one of the reasons why the CJEU, entrusted with the interpretation of provisions of secondary legislation concerning concepts of family law, chooses to provide autonomous definitions, even detached from national law and based exclusively on the reality of the emotional bond.

Moreover, as shown in this study, starting from the reality that the European citizen cannot be detached from the family circle, we are also witnessing a change of perspective, with classic rights belonging to the common European vocabulary, such as the right to free movement, being interpreted extensively precisely in order to protect the fundamental rights of the child. Essentially, when a child, whether a European citizen or a family member of a European citizen, is at the centre of a judicial procedure, with or without a transnational component, everything revolves around the best interests of the child.

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Attributes of the Romanian State. Special View on the Rule of Law

By Andra Nicoleta Puran[*]

The attributes of a state constitute its defining features and principal values of its constitutional order, which differentiate or resemble it as a political-legal physiognomy from other states. The rule of law, pluralism, democracy, civil society are universal values of contemporary political thought and practice and can be found normatively expressed in international documents, but also in the Romanian Constitution. Starting from the specialised doctrine and jurisprudence of the Constitutional Court of Romania in the matter, this article analyses the attributes of the Romanian state enshrined by the Constitution, respectively: rule of law; welfare state; pluralistic state; democratic state. In this study, a special attention is dedicated to the rule of law, considering the dangers that threaten it in the current period. Legislative inflation, superficial legislation, increasing the role of the Executive in the field of legislation at the expense of Parliament, the intrusions of politicians into the sphere of judicial power are just some of the dysfunctions of the Romanian rule of law. In this context, this article highlights the essential role of the Constitutional Court in guaranteeing and respecting the requirements of the rule of law. Through its jurisprudence, an important contribution is made not only in the correct interpretation and application of constitutional norms, but also in their elaboration. Under the influence of the specific socio-political factors in each country, the pressures of the Union and international law, the rule of law cannot reach perfection, but it remains a fundamental constitutional necessity whose primary purpose is to ensure the rights and freedoms of citizens.

Keywords: *attributes of the state, rule of law, the jurisprudence of the Constitutional Court of Romania, dysfunctionalities of the Romanian rule of law.*

Introduction

The people form the society, which is and must be organised. The organisation of human society in the state has been realised throughout history in different forms, but the factors that make up the state have preserved their legal identity.

From the perspective of these legal constants, the notion of state has two meanings. In the political-sociological sense, the state means the sum of three distinct elements: the territory, the people and sovereignty, the latter in the sense of state power. In a second sense, the state means the organised form of the people's power, more concretely, the state mechanism or apparatus. In this

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sense, the people hold the political power. In order to be able to exercise it, the people create the state as a systematised set of organs, also called state or political authorities.

The state is the most important of the political institutions of a society. The state is a necessity and represents the superior power of society. The state is closely related to law. The state and law appeared at the same time and from the same causes. The state creates the right, and the right delimits the configuration and limits the actions of the state.

The modern constitutional theory of the state emphasises that in any contemporary democratic society, the state organisation of society is subordinated to the conditions imposed by the concept of the rule of law, which, in essence, expresses the supremacy of the law, implicitly of the Fundamental Law over everything that forms organisation, functioning and attributions of the state.

Research Methods used

For the preparation of this paper, the Romanian Constitution of 1991, revised in 2003, and the jurisprudence of the Constitutional Court of Romania were used as primary sources. The main research methods used were the logical method, the quantitative method and the informational method. Consequently, the exegetical method and the analytical-synthetic method specific to formal logic allowed us to interpret the constitutional provisions dedicated to the attributes of the Romanian rule of law and to discover the legal principles underlying them. Quantitative and informational methods were used in the part dedicated to the analysis of the dysfunctionalities of the Romanian rule of law. Last but not least, we specify that although the topic is approached predominantly from the perspective of constitutional law, the bibliographic sources used give the text an interdisciplinary character, the study also being based on documentation sources from other fields, respectively: general theory and philosophy of law, sociology and political science.

Results and Discussion

Romania - Social, Pluralistic and Democratic State

State attributes are defined as its defining dimensions and principal values of any constitutional order. The rule of law, pluralism, democracy are indisputably universal values of political thought and can be found normatively expressed not only in international documents, but also in the Romanian Constitution.

Based on its attributes, the quality of the state as a subject of constitutional law is configured and both the power and the complex relations between the state and citizens and the other subjects of constitutional law are defined[1].

According to art. 1 paragraph (3) from the Romanian Constitution, the attributes of the Romanian state are: social state; pluralistic state; democratic state; State law.

Social State

The Romanian state is a social state, which signifies its involvement in the social and economic field.

In the traditional conception, the essence of democracy is freedom and implicitly the limitation of state intervention in the life of society. However, economic and social freedom represent simple wishes, without a material support, without the elaboration of a global development and tracking strategy of the elaborated program.

That is why the constitutional concept of the welfare state does not contradict, but supports democracy through the lens of achieving the general interest that must be evaluated as the fundamental purpose of public services, namely: ensuring a decent standard of living for all residents, ensuring the health of the population, developing the system of instruction and education, of culture, environmental protection, etc.

Constitutional doctrine and political science have emphasised the fact that massive state intervention in the economy and social life is not preferable either, a fact that leads to the statisation of society, but no passive position of the state towards the issue and the achievement of the general social interest.

The essence of the problem lies not in repudiating the role of the state or in amplifying this role, but in establishing the degree of state intervention, as well as the concrete forms of intervention suitable for each stage of society's development.

In accordance with the constitutional provisions, the Romanian state must ensure: freedom of trade, the protection of fair competition, the exploitation of all productive factors; the exploitation of natural resources in accordance with the national interest; restoring and protecting the environment and maintaining the ecological balance; creating the necessary conditions for increasing the quality of life; protecting national interests in economic and financial, currency activity; stimulating scientific research.

Pluralistic State

According to the provisions of art. 8 para. (1) of the Romanian Constitution, pluralism in Romanian society is a guarantee of constitutional democracy.

Pluralism means a multitude of equivalent factors, which cannot be reduced to unity. At the same time, epistemological pluralism or pragmatism affirms that the truth is only what is useful to the individual, and the human person is the supreme category, consequently, it is admitted that power is an

[1]For developments see Andreescu & Puran (2024a) at 99-104; Enache (2011).

inevitable evil and therefore measures must be promoted to protect the person in the face of state power, respectively, the constitutional guarantee of fundamental rights and liberties and the institutionalisation of power limitation structures.

Pluralism must be understood in close connection with the concept of democracy. Through this correlation, democracy is relativised because it puts the majority opinions, as well as the contrary or minority ones, on an equal footing, in terms of value. In this sense, it is stated that pluralism is the opposite of totalitarianism, if two conditions are met:

a) opinions, concepts, attitudes should be lawful, not to contravene constitutional democracy;
b) to respect the majority rule in adopting decisions.

For example, according to the provisions of art. 40 para. (2) from the Constitution of Romania, parties or organisations, which through their goals or activity militate against political pluralism, the principle of the rule of law, or Romania's sovereignty, integrity, or independence are unconstitutional.

The principle of pluralism is opposed to the uniqueness of the exercise of power expressed in consecrating the party's leading role in society. That is why, in a composite and competitive society, institutional pluralism is logical and necessary.

In conclusion, the notion of pluralism concerns multiple aspects of social existence, respectively, political pluralism, institutional pluralism, functional pluralism of state bodies, ideological pluralism and, not least, social pluralism, as a basis for all other forms of manifestation of pluralism. Under no circumstances is this constitutional principle opposed to the unity of the Romanian state, state and territorial indivisibility, the principle of nationalism.

Pluralism is found in all these characteristics of the state, without denying them, but, on the contrary, it gives them true existence and democratic functionality.

Democratic State

Democracy represents a form of moral perfection and dimensions both the organisation and functioning of power to humanise it, as well as the way of life of citizens to moderate it.

Democracy is an integrative concept and phenomenon, accumulating moral, political, and legal values of society, in a determined historical social context and which, in essence, expresses the requirement that the exercise of power be carried out only in relation to the social interest of the holder of power, respectively, the people.

The main constitutional dimensions of democracy are: the exercise of sovereignty by the people; ensuring the people's participation in solving public affairs, through: universal suffrage, legislative initiative, referendum, as well as the existence of an authentic and representative legislative body; sharing the prerogatives of public authorities, collaboration and mutual control; administrative

decentralisation; social, institutional, political and ideological pluralism; application of the majority principle in the deliberative activity of the collegial bodies; the consecration and constitutional guarantee of fundamental rights and freedoms.

According to the provisions of art. 1 paragraph (3) from the Romanian Constitution, the Romanian state is also democratic. This principle is also expressed in other constitutional provisions, respectively: art. 2 para. (1) which states that national sovereignty belongs to the people; Art. 61 para. (1) according to which the parliament is the representative body of the Romanian people and the only legislative authority of the country; Art. 90 which orders that the people express their will on issues of national interest through a referendum; Art. 74 para. (1) and art. 150 which refers to the popular initiative regarding the proposal of a draft law and the revision of the Constitution; Art. 8 para. (1) which proclaims the principle of pluralism as a condition and a guarantee of constitutional democracy and, last but not least, fundamental rights and freedoms are enshrined and guaranteed in the second title of the Romanian Constitution.

Romania – Rule of Law

The concept of the rule of law is one of the most discussed institutions of constitutional law and is related to the transition from law of the state to the rule of law.

In specialised literature, sometimes contradictory opinions have been stated, according to which the rule of law corresponds to an anthropological necessity or that it is a myth, a postulate and an axiom, and on the other hand, the rule of law is a pleonasm, a legal nonsense[2].

Regardless of the opinions expressed over time, the concept of the rule of law represents a constitutional reality whose foundation is found in the mechanisms of exercising state power, in the relationships between power and the freedom of each individual in society and in the application of the principle of legality to all state activity, but also to the behaviour of each member of society[3].

In the notion of the rule of law, two aspects of the legal are involved, apparently contradictory and yet complementary: normativity and ideology.

In terms of normativity, the rule of law appears as a structural principle of the Constitution alongside other essential attributes of the state, materialising fundamental values on which the existence of society and the state is based.

From a normative point of view, the demands of the rule of law are manifested in a double sense: the formal and the material sense.

In a formal sense, the requirement refers to the fact that the state, its organs must comply with the laws, strictly obey the legal rules that have as their object the composition of the state organs, their attributions and functions. In a material sense, we identify the requirement that the state bodies, exercising

[2]For a presentation of them, see Chevallier translated by Dănișor (2012) at 11-69.
[3]See for developments in this regard Arnold (2023) at 7-19.

their powers, respect the legal guarantees regarding the exercise of the fundamental rights and freedoms of the citizens.

In terms of ideology, the rule of law provides a logical system of ideas, through which people represent their society, the state, in all its manifestations and through which legitimacy is conferred on the state.

The phrase "rule of law" is not a simple logical concept, but expresses a fundamental constitutional necessity. Thus, the law is indispensable to the state in order to create its rules and to ensure the finality and effectiveness of legal rules, and the state is indispensable to the right to express power, by establishing a general and mandatory behaviour.

In essence, the rule of law expresses a condition regarding power, a movement to rationalise it, but also a new conception regarding law, its role and functions.

In Romanian specialised literature, the rule of law has been defined as: "that state organised on the basis of the principle of the separation of state powers, in the application of which justice acquires a real independence and following through its legislation the promotion of the rights and freedoms inherent in human nature, ensures the respect strict enforcement of its regulations by all its organs, in their entire activity"[4].

The definition reproduces the main elements of the rule of law - the separation of powers, as a reality of state activity, the application of the principle of legality in the activity of all state bodies, the respect and guarantee of fundamental human rights.

This definition also results in the basic features of the rule of law, respectively:

a) the freedoms of the human person demand guarantee of security and justice through the primacy of the law and especially of the Constitution.
b) the moderation of the execution of power calls for the organisation and adaptation of the functions of the erratic bodies and a hierarchical normative system.

In the final document of the Copenhagen Meeting in 1990, it was specified that the rule of law does not simply mean formal legality, and in the Paris Charter of 1990, the rule of law is prefigured not only in relation to human rights, but also to democracy, as the only system of government.

From the corroboration of the principles inscribed in international documents, as well as in relation to the doctrine of constitutional law, we consider the following to be conditions or characteristics of the rule of law:

1. the accreditation of a new conception regarding the state, especially under the following aspects: the voluntary or consensual nature of the state, the delimitation of the state from civil society, the responsibility

[4]Drăganu (1993) at 128.

of the state and the authorities that make it up and the moderation of coercion as a means of state intervention in society through forms adequate and reasonable;
2. capitalising on the reasons and mechanisms of the principle of separation of powers in the state;
3. the establishment and deepening of an authentic and real democracy;
4. the institutionalisation and guarantee of human and citizen rights and freedoms;
5. establishing a coherent and hierarchical legal order and a field of law.

The regulatory systems that ensure the functionality and systematic coherence of the rule of law are:

a) the political control that is carried out by the Parliament, as one of its essential functions, through various institutional means;
b) the administrative control that is carried out in the system of public administration bodies, either at their initiative or at the initiative of citizens;
c) jurisdictional control over the legality of administrative acts, entrusted either to common law courts or to specialised courts;
d) control of the constitutionality of laws;
e) control of respect for fundamental rights and freedoms through the authority bodies and the judiciary;
f) the conciliation and control procedure, which is carried out through the institution of the "ombudsman" or the People's Advocate;
g) free access to justice and the organisation of judicial activity in several degrees of jurisdiction.

Regarding the consecration of the rule of law in the Romanian Constitution, it should be mentioned that this is achieved not only by art. 1 paragraph (3), but also through numerous other provisions that give consistency to this concept of constitutional law. For example, art. 16 para. (2) of the Romanian Constitution provides that no one is above the law, and art. 15 para. (2) proclaims the principle of non-retroactivity of the law.

Last but not least, the constitutional provisions refer to the fundamental rights, freedoms and duties of citizens, to the mechanism of separation of powers, to pluralism, to the organisation and functioning of state authorities, to free access to justice and the organisation of parliamentary, administrative and jurisdictional control.

The Romanian Constitution establishes, in its normative content, the main guarantees of the rule of law:

a) the constitutional regime, i.e. the establishment in the Constitution of the fundamental principles of organisation and activity of the three powers. Establishing the legal regime applied to the revision of the Constitution;

b) the direct or indirect popular legitimacy of state bodies and public authorities;
c) ensuring the supremacy of the Constitution through a political or jurisdictional control, as well as ensuring the supremacy of the law, compared to other normative acts;
d) the exercise of fundamental rights and freedoms can only be restricted temporarily, only in expressly determined situations, proportional to the circumstance that justifies the restriction and without suppressing the fundamental right or freedom itself;
e) independence and impartiality of justice. Thus, art. 21 para. (2) of the Romanian Constitution stipulates that no law can restrict a person's free access to justice, for the defence of rights, freedoms and legitimate interests.

The Contribution of the Jurisprudence of the Constitutional Court of Romania to the Definition of the Defining Elements of the Rule of Law

The Constitutional Court identifies the fundamental feature of the rule of law, namely the supremacy of the Constitution and the obligation to respect the law[5].

At the same time, it was stated in the jurisprudence of the constitutional court that the rule of law, ensuring the supremacy of the Constitution, also achieves "the correlation of all laws and all normative acts with it."[6]

The requirements of the rule of law concern the major goals of the state activity, namely the supremacy of the law, which implies the subordination of the state to the law. In this sense, the law provides the means by which political options or decisions can be censored and eliminate any abusive and discretionary tendencies of the state structures. At the same time, the rule of law ensures the supremacy of the Constitution, the existence of the regime of separation of public powers and enshrines guarantees, including of a jurisdictional nature, which ensure respect for the rights and freedoms of citizens, primarily by limiting the authority of the state, a fact that represents the inclusion of the activity of public authorities in the limits of the law.

The jurisprudence of the Constitutional Court thus expresses the main requirements of the rule of law in relation to the goals of state activity. Thus, through jurisprudence, a particularly eloquent synthesis of the doctrine regarding the notion and features of the rule of law is achieved.

The Constitutional Court gives a relevant explanation to the character of the rule of law, enshrined in art. 1 paragraph (3) thesis I of the Constitution, showing that: "The requirements of the rule of law concern the major goals of its activity, prefigured in what is usually called the rule of law, a phrase that implies the subordination of the state to the law, the provision of those means that allow the right to censor political options and, in this framework, to

[5]See the Constitutional Court of Romania, Decision no. 232/2001 (Of. G. no. 727/15 November 2001) and Decision no. 53/2011 (Of. G.. no. 90/3 February 2011).
[6]Decision no. 22/2004 (Of. G.. no. 233/17 March 2004).

consider the possible abusive, discretionary tendencies of the state structures. The rule of law ensures the supremacy of the Constitution, the correlation of laws and all normative acts with it, the existence of the regime of separation of public powers that must act within the limits of the law, namely within the limits of a law that expresses the general will. The rule of law enshrines a series of guarantees, including jurisdictional ones, to ensure respect for the rights and freedoms of citizens through the self-limitation of the state, respectively the inclusion of public authorities in the coordinates of the law"[7].

The principle of stability and security of legal relations is not expressly enshrined by the Romanian Constitution, but, like other constitutional principles, it is implied by the constitutional normative provisions, respectively art. 1 paragraph (3), which enshrines the character of the rule of law. In this way, our constitutional court accepts the deduction, through interpretation, of some legal principles implied by the express norms of the Fundamental Law. In this sense, the Constitutional Court ruled that: "The principle of stability and security of legal relations, although it is not expressly enshrined in the Romanian Constitution, this principle is deduced both from the provisions of art. 1 paragraph (3), according to which Romania is a state of law, democratic and social, as well as from the preamble of the Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights in its jurisprudence"[8].

Also, our constitutional court considered that the principle of security of civil legal relations constitutes a fundamental dimension of the rule of law.[9] The Constitutional Court constantly pronounces for the clarity and predictability of the law, these being requirements of the rule of law. Thus, "the existence of contradictory legislative solutions and the annulment of some legal provisions through other provisions contained in the same normative act led to the violation of the principle of security of legal relations, as a result of the lack of clarity and predictability of the norm, principles that constitute a fundamental dimension of the state of right, as it is expressly established by the provisions of art. 1 paragraph (3) of the Basic Law."[10]

At the same time, the Constitutional Court showed that justice and social democracy are supreme values. In this context, the militarised authorities, in this case the Romanian Gendarmerie, exercise, under the terms of the law, specific duties regarding the defence of public order and tranquillity, the fundamental rights and freedoms of citizens, public and private property, the prevention and detection of crimes and other violations of the laws in force, as well as the protection of the fundamental institutions of the state and the fight against acts of terrorism. Consequently, the constitutional court ruled: "Through

[7]Decision no. 17/21 January 2015 (Of. G. no. 79/ 30 January 2015); Also Decision no. 70/2000 (Of. G.. no. 334/19 July 2000).
[8]Decision no. 404/ 10 April 2008 (Of. G. no. 347/ 6 May 2008)); Also Decision no. 685/2014 (Of. G. no. 92/ 4 February 2015).
[9]See Decision no. 570/2012 (Of. G. no. 404/ 18 June 2012); Decision no. 615/2012 (Of. G. no. 454/ 6 July 2012).
[10]Decision no. 26/2012 (Of. G. no. 116/ 15 February 2012).

the possibility of some militarised authorities to ascertain the contraventions committed by civilians, is not affected in any way the art. 1 paragraph (3) from the Constitution, referring to the Romanian state, as a state governed by law, democratic and social"[11].

Human dignity, together with the freedoms and rights of citizens, the free development of the human personality, justice and political pluralism, represent supreme values of the rule of law [art. 1 paragraph (3)].

In the light of these constitutional regulations, it was ruled in the jurisprudence of the Constitutional Court that the state is forbidden to adopt legislative solutions that can be interpreted as being disrespectful to the religious or philosophical beliefs of the parents, which is why the organisation of the school activity must achieve a fair balance between the process of education and the teaching of religion, and on the other hand respecting the rights of parents, to ensure education in accordance with their own religious beliefs. Activities and behaviours specific to a certain attitude of faith or philosophical, religious or non-religious convictions, must not be subject to sanctions that the state provides for such behaviour, regardless of the faith motivations of the person in question. "As part of the constitutional system of values, freedom of religious conscience is assigned the imperative of tolerance, especially with human dignity, guaranteed by art. 1 paragraph (3) of the Basic Law, which dominates as the supreme value the entire system of values"[12].

It is also interesting to underline the fact that our constitutional court considers human dignity to be the supreme value of the entire constitutionally enshrined value system, a value that is found in the content of all fundamental human rights and freedoms. At the same time, it is an important aspect that requires all the state authorities to have in mind first of all the respect for human dignity in their entire activity.

It should be noted that in its jurisprudence, the Constitutional Court also identifies the content components of human dignity, as a moral value, but at the same time constitutional, specific to the rule of law: "Human dignity, from a constitutional point of view, assumes two inherent dimensions, namely the relationships between people, which refers to the right and obligation of people to be respected and, correlatively, to respect the fundamental rights and freedoms of their peers, as well as the relationship of man with the environment, including the animal world"[13].

Dysfunctionalities of the Romanian Rule of Law

Superficial Legislation

All the requirements and defining elements presented above and outlined at the theoretical and jurisprudential level should define the law of a rule of

[11]Decision no. 1330/2008 (Of. G. no. 873/ 23 Decembre 2008).
[12]Decision no. 669/2014 (Of. G. no. 59/ 23 January 2015).
[13]Decision no. 1/2012 (Of. G. no. 53/ 23 January 2012); see also Decision no. 80/2014 (Of. G. no. 246/ 7 February 2014).

law. Unfortunately, these are not always found in the real existence of the current Romanian state. The rule of law is not and cannot be a perfect reality.

The evolution of contemporary Romanian society, often accompanied by an excessive need for regulation, makes the rule of law less and less successful in fulfilling its essential purpose, namely, the protection of the individual. The rule of law should ensure the predictability of the normative constraint not only by avoiding the introduction of an untimely rule into society, but also by ensuring predictability in terms of the modification of the normative act and its execution[14].

In the specialised literature it has been shown that an untimely law or one that is amended very often is contrary to the rule of law. The practice of legislative changes is not new in our country. As an example, we mention some situations from the history of Romanian legislative practice that support our statements. For example, Law 188/1999 on the status of civil servants, since its republication in 2007, has undergone more than 14 changes in less than three years, Law no. 161/2003 regarding some measures to ensure transparency in the exercise of public dignities, public functions and in the business environment, the prevention and sanctioning of corruption was amended 5 times in 2004, twice the following year, 6 times in 2006, three times in 2007-2008 and at least 11 times only in the period 2009-2011, etc finally being repealed by GEO 57/2019 regarding the Administrative Code. In turn, the Administrative Litigation Law no. 554/2004 was amended 33 times between 2004-2018[15].

The normative excess and legislative instability encountered in the current legal system contribute to a decrease in the quality of the law. Thus, the legislation is superficial and from the perspective of the quality of the adopted normative acts.

In order to ensure the accessibility of the norm, the principles of legislative technique provide that the normative act should be written in a specific legal language, a concise, sober, clear and precise style that excludes any ambiguity. Unfortunately, in Romanian legislative practice there is a frequent violation of these principles, incomprehensible, unclear and difficult to apply laws coming into force.

In this sense, it was stated that "the unintelligible nature of a law or a set of laws affects its effectiveness, which is reflected, in particular, in the possibility of being understood by the one who must respect it and the one who must apply. Today, the citizen can understand the law only through the lawyer. He, in turn, often faces the problem of the impossibility of deciphering its meaning due to the complicated, ambiguous style in which it is written. The complexity of decision-making, the complicated procedure for drafting the law, and not all the rules and instruments established by the system of legislative technique at the disposal of the jurist - drafter of laws do not always ensure the guarantee of obtaining a good law"[16].

Excess Power in the Activity of State Bodies

[14]Duminică (2014a) at 409-414.
[15]Duminică (2014b) at 27-28.
[16]Duminică (2012) at 169-187.

The excess of power in the activity of the state bodies is equivalent to the abuse of law, because it signifies the exercise of a legal competence without a reasonable motivation or without an adequate relationship between the ordered measure, the factual situation and the legitimate goal pursued. The exceptional situations represent a particular case in which the state authorities, and especially the administrative ones, can exercise their discretionary power, there is obviously the danger of excess power.

The excess of power can be manifested in these circumstances at least through three aspects: a) the appreciation of a factual situation as being an exceptional case, although it does not have this meaning (lack of objective and reasonable motivation); b) the measures ordered by the competent state authorities, by virtue of discretionary power, exceed what is necessary to protect the seriously threatened public interest; c) if these measures excessively, unjustifiably, limit the exercise of fundamental rights and freedoms, constitutionally recognised.

The existence of crisis situations - economic, social, political or constitutional - does not justify the excess of power. In this sense, it was stated that: "the idea of the rule of law requires that they (exceptional situations n.n.) find adequate regulations in the text of the constitutions, whenever they have a rigid character. Such a constitutional regulation is necessary to limit the areas of social relations, in which the transfer of competence from the parliament to the government can take place, to emphasise its temporary nature, by establishing some terms of applicability and to specify the purposes for which it is carried out."[17]

The restriction of the exercise of some fundamental rights or freedoms, by law, represents an interference of the state in the exercise of these rights and freedoms, justified by the achievement of a legitimate goal. In order to avoid arbitrariness or excess of power on the part of the state authorities that adopt such measures, it is necessary to have guarantees provided by the state, which are adequate to the constitutional purpose pursued, that of the protection of fundamental rights and freedoms, in the concrete situations in which they could be harmed. The principle of proportionality is such a constitutional guarantee that allows the sanctioning by the constitutional court of the arbitrary interference of the Parliament or the Government in the exercise of these rights[18].

Therefore, the measures adopted by the state which restrict the exercise of some fundamental rights or freedoms in order not to be abusive must not only be legal, i.e. ordered by law, or by a normative act equivalent in legal force to the law, but also legitimate (just), i.e. necessary in a democratic society, non-discriminatory, proportional to the situation that determines them and not affecting the substance of the right. Proportionality and necessity in a democratic society are criteria for assessing, both for the legislator and the judge, the legitimacy of restricting the exercise of some fundamental rights and freedoms.[19]

The exceptional state, respectively the state of emergency and subsequently the state of alert established by the rulers on the Romanian territory, similar to the

[17]Drăganu (1993) at 106.
[18]Andreescu (2007) at 132-141.
[19]Andreescu & Puran (2023) at 119.

existing situation in other countries of the world, in order to limit the spread of the pandemic created by the Covid-19 virus, generated the adoption of numerous normative acts by which a significant number of fundamental rights and freedoms are restricted and correlatively a significant constitutional jurisprudence on the constitutionality of these measures[20].

For example, The Constitutional Court by two decisions, Decision no. 152/ 2020 and Decision no. 157/13 May 2020 found the unconstitutionality of some provisions of GEO no. 1/1999 and GEO no. 21/2004 on the National Emergency Management System, regarding the actions and measures ordered during the state of emergency regarding the restriction of the exercise of certain rights.

By Decision no. 152/2020[21], the Constitutional Court, among others, admitted the exception of unconstitutionality formulated by the People's Advocate and found that the provisions of art. 28 of GEO no. 1/1999 on the state of siege and the state of emergency are unconstitutional. Also, it ascertained that the GEO no. 34/2020 on the modification and amendment of the GEO no. 1/1999 on the state of siege and the state of emergency is unconstitutional, in its ensemble.

In order to pronounce this decision, the Court held that the constitutional prohibitions provided in art. 115 para. 6, not to adopt emergency ordinances that may affect the regime of fundamental state institutions, the rights, freedoms and duties provided by the Constitution, electoral rights, have taken into account the restriction of the Government's competence to legislate in these essential areas instead of Parliament.

It is obvious that the normatively materialised intention of the Government to restrict the exercise of certain rights and fundamental freedoms with the violation of its legislative competence in this area and the non-compliance with the constitutional interdictions, represent an excess of power which the Constitutional Court has ascertained and removed.

Increasing the Role of the Executive in the Field of Legislation to the Detriment of the Parliament

We identify another dysfunctionality of the Romanian rule of law in the excessive insertion of the Executive in the legislative activity. Thus, according to the Romanian constitutional provisions, the adoption of laws as a result of the engagement of the political responsibility of the Government can be used in extreme cases, when the adoption of the draft law in ordinary legislative procedure or in emergency procedure is no longer possible or when the political structure of the Parliament does not allow the adoption of the draft law in the current or emergency procedure. The use of this form of legislation has as an important consequence the absence of any parliamentary discussions or deliberations on the draft law. If the Government is supported by a comfortable majority in the Parliament, through this procedure it can obtain the adoption of laws by "bypassing the Parliament", which can have negative consequences regarding the observance of the principle of separation of powers in the state, but also regarding the role Parliament as defined by the Constitution.

[20]For developments see Andreescu & Puran (2021) at 172-202.
[21]Published in the Official Gazette No 387/13 May 2020.

Consequently, the recourse to this constitutional procedure by the Government for the adoption of a law must have an exceptional character, justified by a well-defined political situation and social imperative.

However, the political practice of the Romanian Governments in recent years is contrary to these rules and principles. The executive frequently resorted to assuming responsibility not only for a single law, but also for packages of laws.

The Government's politicism, clearly expressed through the high frequency of recourse to this constitutional procedure, seriously undermines the principle of political pluralism, which is an important value of the legal system enshrined in the provisions of art. 1 paragraph (3) of the Constitution, but also the principle of parliamentary law which shows that "the opposition expresses itself and the majority decides". The censorship of the Constitutional Court did not prove to be sufficient and effective to make the Government respect these values of the rule of law.

All the governments after the 1989 Revolution massively resorted to the practice of emergency ordinances, a fact widely criticised in the specialised literature[22].

The conditions and prohibitions introduced by the 2003 revision law regarding the constitutional regime of emergency ordinances, prove in practice to be insufficient to limit this practice of the executive, and the control of the Constitutional Court has also proven to be insufficient and even ineffective.

The consequence of such a practice is the violation of the role of the Parliament as "the sole legislative authority of the country" (art. 61 of the Constitution) and the creation of an imbalance between the executive and the legislature by emphasising the discretionary power of the Government which has often turned into excess power[23].

In the current conditions characterised by the tendency of the executive to take advantage of obvious politicism and to force the limits of the Constitution and of democratic constitutionalism in an impermissible and dangerous way, it is necessary to create mechanisms to control the activity of the executive in a position to really guarantee the supremacy of the Constitution and the principles of the rule of law.

Dysfunctions of the Justice System

Contradictions and, in general, any dysfunction in the justice system's coherence or inadequacy for the purpose are its illnesses, its shortcomings, which distance it from its purpose and truth. When the diseases of justice become chronic, but with manifestations that lead to exacerbation, we can speak of a crisis of the justice system. Our justice is in such a chronic crisis with exacerbation tendencies. The main cause is the morbid contradictions of the system. Sickening contradictions tend to further distance justice from reality and its truth.

The expression of the crisis in which contemporary justice finds itself is reflected in the contradiction between law and justice. There is an essential break

[22]From recent doctrine, see Vedinaș (2023) at 100; Safta (2023) at 123-132.
[23]Duminică (2014c) at 59-67.

between the value order that should constitute the purpose and essence of justice, and on the other hand the constructed order of norms and jurisprudence.

The mentioned contradiction gave free rein to the "will to power" of the governors to impose their own order and legitimacy on justice by regulating and legislating in the senseless and illusory attempt to create an "order of norms" that would replace the being and truth of justice: justice. Reality demonstrates that this false order often proves itself incoherent, contradictory and above all inadequate to the realities for which it is intended. The simple accumulation of norms does not lead to the establishment of the social and justice in their being and purpose if the norms do not express the essence as a phenomenon, respectively: the higher order of the values of justice, equity, truth, proportionality, tolerance.

The contemporary crisis of justice means the fall from the immutability of the own transcendental value and existence in the social and political externality with the consequence of the diminution or even the loss of the being, of the right as a value. The examples are unfortunately far too many: conflicts and contradictions within the institutional system of justice; the transformation of justice into a tool for political or other actors; the involvement in the struggle for temporary power or in the power games of both the judiciary as a whole and the magistrates; the transition from the mediatisation of judicial documents, to media justice, carried out by the mass media; the arrogant and aggressive rhetoric of baseless forms through the random use and especially for the satisfaction of often immoral selfish interests of the sacred name of justice and law: "in the name of the law", "in the name of the right" become simple formulas to legitimise which is illegitimate[24].

Unfortunately, this crisis of justice is felt perhaps not so much by the judicial system as especially by those who are its beneficiaries: the man, the people, the society.

Conclusions

All these threats to the rule of law were signalled not only at the level of the specialised doctrine, but also in the 2020, 2021, 2022 Reports on the situation of the rule of law in the E.U.[25] where in the chapter dedicated to Romania some dangers related to the frequent changes in the legislation, the widespread use of accelerated procedures and emergency ordinances of the government, as well as some problems in the judiciary are noted.

Even if compared to previous years, there is notable progress in respecting the requirements of the rule of law in our country, however, the 2023 Report also states that "frequent changes in legislation and the quality of the legislative process remain an important cause for concern [...]"[26].

All these aspects lead us to affirm that the rule of law does not represent a state whose essence is exhausted by the constitutional regulations and by other

[24] Andreescu & Puran (2024b).
[25] See the 2020, 2021 and 2022 Rule of Law Reports at 15, 20, 24-25.
[26] The 2023 Rule of Law Report. The chapter devoted to the situation of the rule of law in Romania, at 26.

normative acts or by the jurisprudence of the Constitutional Court at a given moment. The rule of law is not exclusively an institution of constitutional law, but must become a reality, found at the level of the conduct of every subject of law, whether he is a state organ or a simple citizen. This means and implies a complex evolutionary process in which all the structures of society participate and, at the same time, a process of improvement in ideological and moral terms with the aim of perfecting the activity of state bodies and the effective establishment of the principle of legality, the formation of a civic behaviour in the spirit of respect the law and the fundamental values of democracy.

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Press Freedom in Romania: Regulation, Realities, and Expectations in the Context of Adopting New European Regulations

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Part of the freedom of expression, press freedom is guaranteed in Romania by the fundamental law. After the repeal, in 2012, of the press law adopted during the communist period, no new press law has been adopted. There have been initiatives in this regard, but the opposition from journalists, who feared the introduction of restrictions on press freedom, has been stronger. Although Romanian legislation is, as stated, aligned with European standards, in reality, the freedom of the press in Romania has been subject to some criticism. Reports from international organisations, such as Reporters Without Borders, have highlighted various issues, such as political pressures on journalists, self-censorship in the media, and excessive concentration of ownership in the media industry.The adoption of new European regulations could bring significant changes to the field of press freedom in Romania. Such regulations could impose higher standards for protecting journalists against political pressures and could promote transparency and pluralism in the media. In consequence, the adoption of new European regulations is expected to bring significant benefits for press freedom in Romania, strengthening the role of a free press in democratic society and contributing to the protection of citizens' fundamental rights to information and media pluralism.

Keywords: *Press freedom; Political pressure on journalists; European regulations; Right to information and media pluralism*

Introduction

"Expression" and all aspects related to ensuring its freedom actually represent the social dimension of the human being. It is the way in which an individual builds and defines themselves in relation to others, not just in relation to themselves[1]. Communication and the expression of thoughts are not merely possibilities; they also constitute essential conditions for human existence and the functioning of an organised society, structured according to historically established criteria of civilization. For this reason, freedom of expression is considered a natural right, recognised as such since the earliest constitutional documents.

From a constitutional law perspective, freedom of expression is a fundamental right with a complex content and represents one of the greatest values of civil liberty.

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[1]Andreescu (2018).

The exercise of this right inevitably also involves responsibilities, freedom of expression, at least from a legal point of view, not being absolute or intangible. It can be subject to conditions, limits, restrictions that naturally arise from the limits of man's social existence in relation to his peers. The social dimension of the human being is always defined from a legal point of view, because it can be included within quantifiable limits and determined by the legal order.

This perspective helps us understand that freedom of expression is essential to an individual's ability to participate fully in social life. It allows individuals to express their thoughts, beliefs and emotions, thereby contributing to the collective discourse that shapes society's values and norms. The legal framework governing this freedom must balance the individual's right to express himself with the need to protect the rights and dignity of others. This balance is crucial for maintaining social harmony and upholding the principles of a democratic society.

Freedom of expression has a complex legal content that includes: a) freedom of opinion; b) freedom of information; and c) freedom of the press [2].

Freedom of the press is an essential foundation of a democratic society, ensuring not only transparency and accountability, but also fair and balanced information to citizens. Through a free and independent press, the actions of the government and other institutions of power are monitored, thus contributing to the prevention of abuses and corruption. In addition, a free press allows for diversity of opinion and public debate, crucial elements for a healthy democracy.

In Romania, this concept has evolved significantly, passing through various stages of transformation, especially after the collapse of the communist regime in 1989, because, during the communist period, the press in Romania was strictly controlled by the state, freedom of expression being non-existent, the guidelines imposed by the Romanian Communist Party governing the activity of journalists.

After the Revolution of 1989, Romania began the transition to democracy, and the press gained a greater degree of freedom.

This research aims to provide a clear picture of the status of press freedom in Romania, a subject of particular importance for Romanian and European democracy, as well as the provisions of the new European Regulation on press freedom, known as the European Mass Media Freedom Law (European Media Freedom Act - EMFA), analyzing the impact of these new European regulations on press freedom in Romania.

Freedom of the Press in Romania. Regulation

After the repeal of the Press Law of the Socialist Republic of Romania no. 3/1974[3] by Law no. 95/2012, no new media law was adopted[4], although there have been attempts to do so, as a result of opposition from journalists who

[2]Andreescu & Puran (2023) at 290.
[3]Although it was only repealed in 2012, the law no longer applied, having fallen into disuse.
[4]For developments see Tabacu & Draghici (2006) at 168-170

believed that new regulation on the matter would affect independence and freedom of expression[5].

Currently, in Romania, press freedom is regulated by a series of laws and regulations aimed at protecting the right to information, ensuring the transparency and independence of the media, as well as preventing abuses.

In art. 30 of the Constitution of Romania from 1991 Republicated[6], freedom of expression has been enshrined as a fundamental right of citizens, guaranteeing them the freedom to express their thoughts, opinions and beliefs freely, through speech, writing, images or other means of communication[7]. However, the fundamental law also regulates the limits of freedom of expression[8], which "cannot be absolute, but is subject to the principles of legal and moral responsibility and liability"[9].

Art 31 of the Romanian Constitution regulates the right to information, correctly informing the public opinion representing an obligation of the mass media. For this purpose "public radio and television services are autonomous. They must guarantee any important social and political group the exercise of the right to broadcasting time. The organisation of these services and the parliamentary control over their activity are regulated by an organic law"[10].

The jurisprudence of the European Court of Human Rights on the freedom of the press is extensive and has had a significant impact on the way this right is protected and interpreted in the member states of the Council of Europe. The Court established through its rulings important principles that contribute to the protection and promotion of press freedom, among which we mention: freedom of expression is valid not only for information or ideas that are favorably received or considered harmless, but also for those that offend, shock or disturb the state or any other segment of the population[11]; the limits of acceptable criticism are wider when it comes to politicians, who must tolerate a higher level of criticism[12]; ordering the disclosure of the journalist's source constitutes a violation of Article 10 of the European Convention on Human Rights, emphasizing the importance of

[5]Cercelescu (2015).

[6](1) The freedom of expression of thoughts, opinions or beliefs and the freedom of creations of any kind, through live speech, through writing, through images, through sounds or through other means of public communication, are inviolable. (2) Censorship of any kind is prohibited. (3) Freedom of the press also implies the freedom to establish publications. (4) No publication can be suppressed. (5) The law may impose on mass media the obligation to make public the source of funding.

[7]Arbetman & O'Brien (2005) at 445-462.

[8]Art. 30 Constitution of Romania para. (6) Freedom of expression cannot prejudice the dignity, honor, private life of the person, nor the right to one's own image.
(7) Defamation of the country and the nation, incitement to war of aggression, national, racial, class or religious hatred, incitement to discrimination, territorial separatism or public violence, as well as obscene manifestations, contrary to good morals, are prohibited by law. .
(8) The civil liability for the information or for the creation brought to public knowledge rests with the editor or creator, the author, the organizer of the artistic event, the owner of the means of multiplication, of the radio or television station, under the conditions of the law. Press offenses are established by law.

[9]For developments see Andreescu & Puran (2020) at 6.

[10]Art. 31, para. 5 of the Romanian Constitution.

[11] *Handyside v the United Kingdom* [1976] ECHR 5493/72.

[12]*Jersild v Denmark* [1994] ECHR 15890/89.

protecting journalistic sources to ensure the free flow of information of public interest[13].

Thus, the Strasbourg Court has significantly contributed to defining and protecting press freedom in Europe. The Court's jurisprudence has established that freedom of the press is essential in a democratic society and that any restriction on this freedom must be necessary, proportionate and clearly justified. The Court also emphasised the importance of protecting journalistic sources and tolerating a high level of criticism, particularly of politicians and other public figures.

The Constitutional Court of Romania often refers to the jurisprudence of the European Court of Human Rights and the provisions of the European Convention on Human Rights, especially with regard to the principle of proportionality.

Over time, the Constitutional Court of Romania had an essential role in the interpretation and application of freedom of expression. Through its decisions, the Court clarified the limits and restrictions of this right, ensuring a balance between freedom of expression and other constitutional values, such as the right to dignity and national security[14].

The Constitutional Court recognised the importance of press freedom in a democratic society and protected the rights of journalists to carry out their work without undue interference from the state or other entities. In numerous judgments, the Court emphasised the need for freedom and independence of the press, rejecting any attempt at censorship or control over it.

Law no. 504/2002 on the audiovisual sector amended and supplemented by Emergency Ordinance no. 192/2022, which aimed to transpose the provisions of Directive (EU) 2018/1808[15] into national legislation, regulates the activity of broadcasting radio and television programs, establishing the conditions for granting audiovisual licenses and the responsibilities of broadcasters.

Law no. 544/2001 on free access to information of public interest establishes the right of any person to request and obtain information of public interest from public authorities and institutions.

Law no. 148/2000 on advertising regulates advertising activity, including in the mass media, ensuring the protection of consumers against misleading and abusive advertising.

Law no. 190/2018 on measures to implement the General Data Protection Regulation (GDPR) regulates the protection of personal data and private life in the electronic communications sector, also having implications on the media's activity.

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[13]*Bladet Tromsø and Stensaas v. Norway* [1999] ECHR 21980/93.

[14]Decision of the Constitutional Court no. 51/1999 (Official Gazette no. 262 of 9 June, 1999); Decision of the Constitutional Court no. 205/2000 (Official Gazette no. 702 of 28 December, 2000).

[15]Romania was sent, on 19 May 19, 2022, to the Court of Justice of the European Union (CJEU) by the European Commission for failure to fulfill the obligation to transpose the Audiovisual Media Services Directive (Directive (EU) 2018/1808), aiming modernizing the rules regarding audiovisual media services in the context of technological developments and the digital market, improving the protection of minors and consumers, as well as ensuring a pluralistic and diversified media landscape. At the end of 2022, the Government of Romania adopted Emergency Ordinance no. 192/2022 for the amendment and completion of the Audiovisual Law no. 504/2002.

The journalist's code of ethics is a set of ethical and professional norms that journalists are encouraged to follow in order to ensure fair and responsible journalistic practice.

Also, the national regulation of press freedom is guaranteed by decisions and regulations issued by the National Audiovisual Council (CNA) which include detailed rules regarding program content, advertising, protection of minors and other aspects specific to audiovisual.

Challenges faced by Press Freedom in Romania Today

Although there is a legal framework that protects freedom of expression and media independence, in practice the situation is complex. Various international[16] and local reports highlight issues such as:

1. Exercising political pressure on some media institutions, through various methods: direct or indirect funding, editorial control, pressure on journalists. For example, on January 6, 2022, Radio Europa Liberă published an investigation under the signature of journalist Cristian Andrei, in which the sums of money pumped in 2021 into some television and online publications by certain political parties were revealed[17].
   In 2023 there was a doubling of the 2021 budget, with the money coming from the public subsidy granted to parliamentary parties for the press and propaganda category[18]. Political influence on the media undermines the credibility of media institutions and journalism in general, and the public becomes skeptical of the impartiality and truthfulness of the information presented. Also, political control of the media reduces the diversity of opinions and perspectives available to the public, which can lead to a partial and one-sided information.

2. Certain politicians or businessmen with political connections directly or indirectly own media institutions, which allows them to control editorial lines and influence the public agenda.
   The commercial factor also has an influence on the editorial lines. For example, the publications owned by Ringier in Romania, Libertatea and GSP, faced an interference of this factor in the editorial process. The measures taken by the Ringier management were to close the GSP print shop and fire the editor-in-chief[19]. This situation prompted a deputy belonging to the Renew Europe political group to formulate and address a

[16]https://rsf.org/en/country/romania
[17]https://www.g4media.ro/o-presa-platita-sa-taca-sau-sa-tipe-la-ordinul-marilor-partide-pe-banii-tai.html
[18]chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://cji.ro/wp-content/uploads/2024/04/Starea-mass-media-din-Romania-in-pragul-anului-super-electoral-2024-1.pdf, accessed on 11.06.2024
[19]https://romania.europalibera.org/a/indepenta-pres%C4%83-ringier-pacanele-finantare/32624708.html

priority question for for written answer to the Commission[20]. To the questions posed: Is the Commission aware of the problems in Romania mentioned above and how does it assess the situation?, respectively Does the Commission intend to take measures in this matter or initiate a dialogue with the Romanian authorities about the situation of press freedom in Romania? the answer was that it was precisely the increase in the number of cases of unjustified interference in editorial decisions determined by economic or political interests in Europe that led the Commission to adopt, in 2022, the proposal for a European law on media freedom to promote the internal market in the media sector, thus strengthening the freedom and pluralism of the media. Also, the close monitoring of media pluralism and freedom in Romania within the rule of law mechanism will be continued by the Commission.

A free and independent press is essential for the proper functioning of democracy. When the media is influenced by the political or commercial factor, its role as a "watchdog" of democracy is compromised, and the transparency and accountability of the rulers are affected.

3. Pressure, harassment and intimidation of "inconvenient" journalists.

In December 2023, journalists took to the streets to join human rights activists protesting in front of the General Prosecutor's Office in support of Emilia Şercan, a journalist who received numerous death threats and was subjected to smear campaigns for her investigations into the academic plagiarism of high-ranking officials[21]. As stated in the Reporters Without Borders 2023 Report, in Romania "the safety of journalists remains a matter of concern, as they are often the target of attacks, threats and intimidation. In the high-profile harassment and defamation campaign against the reporter Emilia Șercan, the authorities not only did not do justice, but were also suspected of complicity. Surveillance remains a problem as intelligence services seek to gain more power and influence amid the war in Ukraine and other international conflicts."[22].

Organisations such as Reporters Without Borders and Freedom House have repeatedly expressed concerns about the harassment of journalists in Romania and called on the authorities to take measures to protect press freedom.

In the 2022 Rule of Law Report[23], the European Commission included Romania in the high-risk group regarding press freedom, concerns being expressed regarding the operation and budget of the National Broadcasting Council. Other findings concern the lack of transparency regarding the broadcasting of paid content by political parties outside election campaigns and cases of threats, harassment and physical violence against journalists.

[20]https://www.europarl.europa.eu/doceo/document/P-9-2023-002942_RO.html
[21]https://romania.europalibera.org/a/raport-reuters-presa-digitala/32998176.html
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The 2023 Report states that Romania has not made progress in terms of editorial independence.

The Main Provisions of the European Regulation on Media Freedom

Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services within the internal market and amending Directive 2010/13/EU (hereinafter the Regulation), in force of 7 May, 2024, "is a legislative framework designed to protect and promote media pluralism and independence in the European Union. It was adopted to address a number of challenges and issues facing the media sector in the European Union. Considering the unique role of media services, the protection of media freedom and pluralism, as two of the main pillars of democracy and the rule of law, are essential features of a functional internal market of media services. The main reasons for the adoption of the Regulation included: the existence of concerns about the excessive concentration of media ownership in the hands of a few entities, which may limit pluralism and diversity of viewpoints; divergences between national media regulations that can create obstacles to the efficient functioning of the EU internal market; guaranteeing media transparency, an essential aspect to ensure accountability and public trust; protecting journalists and their sources from harassment, intimidation and reprisals; ensuring the autonomy and functioning without political or economic interference of regulatory authorities; adapting to new technological and digital challenges as a result of the rapid development of digital technologies and online platforms, a situation that raises new issues related to content regulation and user protection.

The adoption of the Regulation reflects the EU's commitment to protect and promote a pluralistic, transparent and independent media landscape, essential for the democratic functioning of society and for the protection of citizens' fundamental rights.

The regulation establishes common rules for the proper functioning of the internal market of media services and establishes a European Committee for media services, while protecting their independence and pluralism.[24]".

One of the essential aspects of European law is the protection of the independence of publishers, who play a crucial role in ensuring a free and diverse press.

The main measures and provisions of the Regulation aim at Transparency of media ownership: Member States have an obligation to ensure transparency of media ownership, allowing the public and authorities access to clear and up-to-date information about who owns and controls media institutions.

According to art. 6 of the Regulation, "*media service providers make available to the recipients of their services, in an easily and directly accessible way, updated information regarding the name of the owner or of their direct or indirect owners with holdings that allow them to exert influence on the operation*

[24]Art. 1 of the European Media Freedom Act.

and on the process strategic decision-making, including the direct or indirect ownership of a state or a public authority or entity" as well as "*the total annual value of public funds for state advertising that have been allocated to them and the total annual value of advertising revenues received from the authorities or public entities from third countries*".

This measure aims to prevent excessive concentrations of power and influence, which can affect editorial independence, transparency of media ownership being an essential element of the Regulation.

The provision aims to ensure that citizens, regulators and other interested parties have access to clear and up-to-date information about who owns and controls media outlets. This is crucial for maintaining media pluralism, preventing concentrations of power and protecting editorial independence.

Media pluralism is essential to a healthy democracy, ensuring public access to a diversity of opinions and perspectives. Transparency of media ownership helps maintain this pluralism by providing a clear picture of the diversity of information sources.

Media ownership information must be easily accessible to the public. This can be done by publishing this data on the websites of media outlets and on the platforms of national regulatory authorities.

Media outlets are also required to periodically update information about their owners to reflect any changes in ownership structure. This includes changes in ownership, mergers, acquisitions or sales of shares. Updates must be made within a reasonable period of time, established by law, to ensure that the information available to the public is always up to date.

Responsibility for monitoring compliance with these transparency obligations rests with national regulatory authorities. They must establish effective mechanisms for the collection, verification and publication of information about media ownership, also having the role of investigating and sanctioning possible violations of transparency obligations.

Transparency of media ownership, as set out in the Regulation, is a fundamental pillar for ensuring a diverse and independent media landscape. By imposing clear disclosure obligations and ensuring public access to this information, the law helps prevent the concentration of power, protect pluralism and increase public trust in the media. Effective implementation and strict monitoring of these provisions are essential to the success of this legislative initiative.

State advertising must be distributed in a transparent, fair and non-discriminatory manner. In this way, the use of public funds to influence or control the editorial content of the mass media is prevented.

The allocation of state advertising will be done according to clear criteria, which ensure that no publisher is disadvantaged or favored on political grounds.

Funding procedures for public media service providers, based on transparent and objective criteria established in advance, guarantee public media service providers adequate, sustainable and predictable financial resources, corresponding to the fulfillment of their public service mission and the protection of editorial independence.

Independence of the Boards of Directors: The Regulation proposes that the members of the boards of directors of media institutions be selected based on their competences and not on political criteria. The procedure for appointing the members of the administrative boards must be transparent, open, effective and non-discriminatory, using transparent, objective, non-discriminatory and proportional criteria established in advance at the national level. This is essential to maintain independent and professional management, and board members must be protected against external influences, including political or economic pressure.

Protection of journalists and publishers: European law includes measures to protect journalists and publishers against harassment and intimidation. These measures include legal protection and access to resources to combat threats, so that journalists and publishers have the freedom to carry out their work without fear of repercussions.

Editorial independence: The law emphasises the need for editors-in-chief and publishers to have full control over editorial content, without interference from owners or other external entities. Editorial decisions must be made freely within the established editorial line of the media service provider.

At the same time, publishers must be protected against any attempts to influence editorial content, including through specific regulations prohibiting undue interference.

Protecting the independence of publishers is essential for freedom of expression. This allows journalists to investigate and report without constraints, contributing to transparency and accountability in society, on the one hand, and, on the other hand, the law contributes to maintaining and promoting media pluralism, thus giving the public access to a wide range of opinions and perspectives, increasing trust in the media.

To ensure that journalistic sources and confidential communications are effectively protected, member states cannot, according to the provisions of art. 4 para. 3 of the Regulation, to take, except in an exceptional manner[25], none of the following measures:

a) compel media service providers or their editorial staff to divulge information related to journalistic sources or confidential communications or that could identify them or compel any persons who, because of their usual or professional relationship with a media services provider or with its editorial staff, could hold such information, disclose it;
b) to detain, sanction, intercept or investigate media service providers or their editorial staff or subject them or their commercial or private premises to surveillance or search and seizure, in order to obtain information related to journalistic sources or confidential communications or that could

[25]According to art. 4, paragraph 4 of the Regulation, such a measure could only be taken if it is provided for by EU law or domestic law, complies with Article 52 paragraph (1) of the Charter and other legislative acts of the Union, is justified on a case-by-case basis for an imperative reason of public interest and is proportionate and subject to prior authorisation by a judicial authority or an independent and impartial decision-making authority or, in duly justified exceptional and urgent cases, to be subsequently authorized by such authority without unjustified delay.

identify them, or detain, sanction, intercept or investigate any persons who, because of their ordinary or professional relationship with a media service provider or its editorial staff, could possess such information or subject them or their commercial or private premises to surveillance or search and seizure, in order to obtain such information;

c) install intrusive surveillance software on any material, digital device, machine or instrument used by media service providers, their editorial staff or any persons who, by reason of their ordinary or professional relationship with a media service provider or with its editorial staff, may hold information related to journalistic sources or confidential communications or able to identify them.

Such intrusive surveillance software could be installed, in compliance with the conditions provided for in art. 4, paragraph 4 of the Regulation, and the installation should be carried out in order to investigate one of the persons mentioned in letter c) for the offenses listed in Article 2(2) of Framework Decision 2002/584/JHA which are punishable in the Member State concerned by a custodial sentence or security measure of a maximum duration of at least three years; or for other serious crimes punishable in the Member State concerned by a custodial sentence or a custodial security measure of a maximum duration of at least five years, as provided for in the legislation of that Member State.

Where such surveillance measures are taken, Member States have an obligation to ensure that they are periodically reviewed by an independent and impartial judicial or decision-making authority to determine whether the conditions justifying their use are still met.

The Regulation establishes the European Media Services Committee, which replaces the Group of European Regulators for Audiovisual Media Services (ERGA), established by Article 30b of Directive 2010/13/EU. The committee is made up of representatives of national regulatory authorities or bodies.

It has an important role in the regulation and supervision of the audiovisual market in the European Union, contributing to ensuring a coherent and efficient framework for audiovisual media services but also in ensuring a fair, transparent media landscape adapted to the needs of contemporary society in the European Union.

The main duties of the Committee include: providing advice and recommendations to the European Commission in relation to regulations and policies related to audiovisual media services, including evaluating and proposing changes to existing directives; monitoring how member states implement and apply European legislation in the media field; facilitating the exchange of information and best practices between national regulatory authorities in the audiovisual field, for a better harmonisation of policies and regulations between member states; assessing the impact of new technologies and trends in the media sector on existing regulations, being able to recommend adjustments or updates to regulations to keep pace with rapid technological developments.

The European Media Services Committee also develops recommendations and good practices for the protection of minors and other vulnerable groups

against inappropriate or harmful content in audiovisual media services, supports measures that promote cultural and linguistic diversity in the audiovisual media sector, in accordance with the values and objectives of the European Union.

In the performance of its duties or in the exercise of its powers, the Committee shall act independently and neither seek nor accept instructions from any government, body, institution or person.

Conclusions

Uniform implementation of the European Media Freedom Regulation across all member states can be challenging given legislative and cultural differences, with a robust monitoring and enforcement mechanism needed to ensure compliance with the law. National and European authorities must work together to identify and sanction violations, given that media owners and entrenched interest groups may oppose changes that affect their influence.

Regarding the media landscape in Romania, the European Regulation on media freedom could have a significant impact on it. Although Romania has legislation that protects the freedom of the press, the application of the Regulation could bring significant improvements regarding the reduction of political pressures on journalists, by implementing strict measures to protect editorial independence; increasing transparency as a result of establishing the obligation to disclose the real owners of media companies allowing the public to better understand who controls the flow of information.

Also, measures to protect journalistic sources and fair funding could reduce cases of censorship and self-censorship.

The European regulation on media freedom is certainly an important step in protecting and promoting the independence of publishers in the European Union. By establishing clear regulations and promoting media transparency and pluralism, it contributes to creating an environment in which journalists and editors can work free from external influences. Effective implementation and strict monitoring of these provisions will be essential for the success of this legislative initiative. For Romania, it could provide an additional protection framework for journalists and improve the public's access to accurate and diverse information.

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Law no. 504/2002 on the audiovisual sector amended and supplemented by Emergency Ordinance no. 192/2022, published in the Official Gazette of Romania, Part 1, no. 534 from 22 July 2002
Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act)Text with EEA relevance published in the Official Journal of the European Union (L) 2024/1083

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Brief Considerations Regarding the Competence of the Central Authorities in Matters of Filiation, in the Context of the Proposal for a Council Regulation on the Creation of a European Certificate of Parenthood[1]

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The study aims to present and analyse the competence of the central authorities in the matter of filiation according to the Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood[2] and according to the regulations in Romanian law such as: Civil Code, Law no. 119/1996 regarding civil status documents, Government Ordinance no. 84/2001 regarding the establishment and operation of community public services for the registration of persons. The authors present due clarifications regarding the dichotomy of the provisions of Romanian law (Romanian private international law, civil law and the regulations from the normative acts stipulated in the paragraph above) and the correspondence with the Council's Proposal for a regulation on filiation, noting the competence, the applicable law, respectively the recognition. Next, the paper will present the competent authorities from the perspective of the proposed Regulation and Romanian law. In conclusion, the authors will present de lege ferenda what changes would be made to the provisions of Romanian law by adopting the Proposal for a Regulation of the Council regarding jurisdiction, the applicable law, the recognition of court decisions and the acceptance of authentic documents in matters of filiation and regarding the creation of a European certificate of filiation considering that there will be rules of immediate application.

Keywords: *Central authorities; Child; Filiation; Parents; Private international law; Romanian law.*

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[2]https://eur-lex.europa.eu/resource.html?uri=cellar:01d08890-76e7-11ed-9887-01aa75ed71a1.0001.02/DOC_1&format=PDF

Introduction - The Legal Provisions relating to the Competence of the Central Authorities in the Matter of Filiation

Book VII entitled "Provisions of private international law from the Civil Code" (arts. 2557–2663) contains Chapter II "Family" (arts. 2585–2612) which dedicates the Section II "Filiation" (arts. 2603–2606) regulating in subsection I "Filiation of the child from marriage" (arts. 2603–2604) and in subsection II "Filiation of the child out of wedlock" (arts. 2605– 2606). Analysing these articles, we observe that they are not dedicated to the competence of the central authorities in the matter of filiation.

However, art. 2557 paragraph (3) of the Civil Code provides that the articles from Book VII apply in situations where "international conventions to which Romania is not a party, Union law European or the provisions of special laws do not establish another regulation."

Thus, considering that Romania is a member state of the European Union and taking into account art. 2557 paragraph (3) Civil Code, we will take into account the provisions relating to the competence of the central authorities in the matter of filiation established by Regulation (EU) 2016/1191 of the European parliament and of the council of July 6, 2016 regarding the promotion of the free movement of citizens by simplifying the requirements for presenting certain official documents in the European Union and amending Regulation (EU) no. 1024/2012[3]. Thus, art. 2 with the marginal name "Scope" stipulates that the legal rules of this regulation apply "with regard to official documents issued by the authorities of a Member State in accordance with its internal law which must be presented to the authorities of another Member State and whose purpose principal is to establish one or more of the following elements: (a) birth; […] (i) parentage; […]".

Art. 3 of the Regulation defines in point (2) the notion of "authority" as "a public authority of a member state or an entity acting in an official capacity and authorised under domestic law to issue or receive an official document that falls under the scope of this regulation or a certified copy thereof" and in point (6) the notion of "central authority" as "the authority or authorities that (have) been designated (designated) in accordance with Article 15 by the member states to perform functions related to the application of this regulation."

Public authorities in Romania designated to act in an official capacity and authorised under domestic law to issue or receive an official document that refers to the civil status that must be presented to the authorities of another member state and whose main purpose is to establish the birth and filiation (in the present work) are provided in art. 3 of Law no. 119 of October 16, 1996 regarding republished civil status documents[4] with subsequent amendments [5].

[3]https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32016R1191
[4]republished in M. O. no. 339 of May 18, 2012.
[5]Law no. 105 of 20 April 20, 2022.

Competence of the Central Authorities in the Matter of Filiation

EU member states according to art. 15 paragraph (1) of the Regulation shall designate at least one central authority competent to issue official documents relating to birth and parentage that must be presented to the authorities of another member state.

In the situation where several central authorities are designated in a member state, that state has the obligation to designate, according to art. 15 paragraph (2) of the Regulation, the central authority to which communications of any kind can be addressed to be forwarded to the competent authority within the other member state that requested the respective document.

Art. 16 of the Regulation stipulates that "the central authorities provide assistance in relation to requests for information made pursuant to article 14 [6] and in particular:

(a)transmit, receive and, where necessary, respond to such requests;
(b)and provide the necessary information on such requests.

Art. 3 paragraph (1) of Law no. 119/1996 stipulates that they have the competence to issue or receive an official document that refers to the civil status that must be presented to the authorities of another member state and whose main purpose is to establish birth and filiation (in this work) county councils, respectively the General Council of the Municipality of Bucharest, the local community public services for records of persons, in the administrative-territorial

[6]Article 14 **Requests for information in cases of reasonable doubt**
1. Where the authorities of a Member State in which a public document or its certified copy is presented have a reasonable doubt as to the authenticity of that public document or its certified copy, they shall take the following steps to dispel their doubt: (a) check the available models of documents in the repository of IMI as referred to in Article 22; (b) if a doubt remains, submit a request for information through IMI: (i) to the authority that issued the public document or, where applicable, to the authority that made the certified copy, or to both; or (ii) to the relevant central authority.
2. A reasonable doubt as to the authenticity of a public document or its certified copy as referred to in paragraph 1 may relate, in particular, to: (a) the authenticity of the signature; (b) the capacity in which the person signing the document acted; (c) the identity of the seal or stamp; (d) the document having been forged or tampered with.
3. Requests for information made under this Article shall set out the grounds on which they are based.
4. Requests for information made under this Article shall be accompanied by a copy of the public document concerned or of its certified copy, transmitted electronically by means of IMI. Such requests and any replies to those requests shall not be subject to any tax, duty or charge.
5. The authorities shall reply to requests for information made under this Article within the shortest possible period of time and in any case within a period not exceeding 5 working days or 10 working days where the request is processed through a central authority. In exceptional cases where the time limits referred to in the first subparagraph cannot be adhered to, the requested authority and the requesting authority shall agree upon an extension of the time limit.
6. If the authenticity of the public document or of its certified copy is not confirmed, the requesting authority shall not be obliged to process them. See Regulation (EU) 2016/1191.

units where they are constituted, as well as the civil status officers within the town halls of the administrative-territorial units where local community public records services do not operate.

According to art. 3 paragraph (2) of Law no. 119/1996 civil status officers are:

a) mayors of municipalities, sectors of the municipality of Bucharest, cities and communes;
b) the heads of diplomatic missions and career consular offices of Romania;
c) ship and aircraft commanders;
d) civil status officers appointed by order of the Minister of National Defence or, as the case may be, of the Minister of Administration and the Interior, according to the provisions of art. 7 para. (7)" of the law[7].

Para. (3) of art. 3 of Law no. 119/1996 stipulates that the exercise of civil status officer duties can be delegated:

- either to the vice-mayor, or to the secretary of the administrative-territorial unit, or to other civil servants from the own apparatus with competence in this field by the mayor;
- either to the diplomat who performs consular functions, or to one of the consular officials, or to one of the consular employees with competence in this field by the heads of diplomatic missions and career consular offices of Romania.

Also according to para. (3) of art. 3 of Law no. 119/1996 the status of civil status officer can be withdrawn either by the mayor, or by the heads of diplomatic missions and career consular offices of Romania.

As an exception, paragraph 4 of art. 3 of Law no. 119/1996 stipulates that another person will be delegated to draw up civil status documents if the civil status officer is a party or declarant.

In the case of Romanian citizens who live abroad, according to art 40 paragraph (1) of Law no. 119/1996, the issuance of civil status documents is done at the diplomatic missions, at the consular offices of Romania or at the competent local authorities.

From the provisions of art. 40 para. (3) from Law no. 119/1996 it is noted that the competent authority in the matter of population records in the state where the Romanian citizen is located "distributes to the diplomatic missions and consular offices of Romania lists with pre-calculated numerical codes, in order to enter them in the birth certificates drawn up and in the certificates issued based on them."

[7]Art. 7 paragraph (7) of Law no. 119/1996.

General Directorate for Records of Persons and Public Local Community Services for Records of Persons (Romanian abbreviation - S.P.C.L.E.P.)

The General Directorate for the Records of Persons is a specialised body of the central public administration, with legal personality, it is part of the order and public safety structures under the Ministry of Internal Affairs and is a component part of the Department of Order and Public Safety.

Government Decision no. 1367/2009 stipulates that the Directorate for the Records of Persons and the Administration of Databases is established by merging the National Inspectorate for the Records of Persons and the National Centre for the Administration of Databases of Data on the Records of Persons, which is abolished.[8]

The Directorate has the following main attributions:

a) organises, coordinates and monitors the way of application, in a unitary manner, by the community public services for records of persons, of the legal regulations in the field of records of persons, civil status and the administrative change of the names of natural persons;
b) elaborates the working norms and methodologies used by the community public services for the registration of persons;
c) updates, uses and valorises the data from the National Registry of Persons, according to the law;
d) provide, in accordance with the law, personal identification data, requested by authorities and public institutions, economic operators and other legal entities for the performance of actions of general interest, regulated by normative acts;
e) solves the requests submitted by Romanian citizens who established their domicile abroad before 1989 or by their legal representatives regarding the communication of the identification data with which they appear in the records;
f)establishes the characteristics and security elements of identity cards and voter cards;
g) manages and administers the National Information System for population records;

[8]E.g. in the territorial administrative unit Timiş County, based on Ordinance no. 84/2001 approved by Law no. by Decision no. 17, the Timiş County Council approved the establishment of the Timiş Persons Registration Directorate, public service community of county interest, with legal personality, subordinated to the Timiş County Council, which has been operating since 01.02.2005. The Directorate was established, mainly, by reorganizing the civil status activity of the Timiş County Council and the population record activity within the Timiş County Service for computerised records of persons. As personnel, the Directorate took over, through transfer, the personnel from the structures of Civil and evidential status of the population: civil servants, contractual staff and policemen. https://dept.cjtimis.ro/infiintare_v1/
The organisational regulation can be accessed at https://dept.cjtimis.ro/wp-content/uploads/2020/07/Regulament-de-Organizare-si-Functionare.pdf

h) is responsible for the implementation of the regulations regarding the confidentiality and protection of personal data, processed at the level of the Directorate;
i) ensures the provision of community public services for the registration of persons with registers and civil status certificates, as well as with the necessary materials for the production of identity cards and voter cards;
j) participates in the activities of initiation, training and professional development of the staff of the community public services for records of persons;
k) collaborates with the other specialised bodies of the central public administration for the establishment of permanent registers, according to the law.

The normative acts that regulate the organisation, operation and resolution of issues within the competence of the General Directorate for the Records of Persons are[9]:

1. Law no. 329/2009 regarding the reorganisation of some public authorities and institutions, the rationalisation of public expenses, the support of the business environment and the observance of framework agreements with the European Commission and the International Monetary Fund;[10]
2. Government Decision no. 1367/2009 on the establishment, organisation and operation of the Directorate for the Registration of Persons and the Administration of Databases [11];
3. Government Emergency Ordinance no. 97/2005 regarding the records, domicile, residence and identity documents of Romanian citizens, republished, with subsequent amendments and additions [12];
4. Government Decision no. 64/2011 for the approval of the Methodology regarding the unitary application of the provisions on marital status [13];
5. Government Ordinance no. 84/2001 on the establishment, organisation and operation of community public services for records of persons, with subsequent amendments and additions [14];
6. Government Decision no. 2104/2004 for the approval of the Methodology regarding the criteria for dimensioning the number of functions in the apparatus of community public services for records of persons, the establishment of patrimony and the management of human, financial and material resources, with subsequent amendments and additions[15];
7. Law no. 119/1996 regarding civil status documents, republished with subsequent amendments [16];

[9]On the website of the Timiş County Council, Government Decision no. 1723/2004.
[10]Published in the Official Gazette, Part I no. 761 of November 9, 2009.
[11]Published in the Official Gazette, Part I no. 802 of November 25, 2009.
[12]Republished in the Official Gazette, Part I no. 719 of October 12, 2011.
[13]Published in the Official Gazette, Part I no. 151 of March 2, 2011.
[14]Published in the Official Gazette, Part I no. 544 of September 1, 2001
[15]Published in the Official Gazette, Part I no. 1146 of December 3, 2004
[16]Republished in the Official Gazette, Part I no. 339 of May 18, 2012.

8. Order of the Minister of Administration and Interior no. 1260/2006 for the approval of the Methodology regarding the organisation and operation of the one-stop shop within the local community public services for the registration of persons[17];
9. Government Ordinance no. 69/2002 regarding some measures for operationalizing the IT system for issuing and circulating electronic identity and residence documents, with subsequent amendments and additions[18];
10. Government Decision no. 1982/2004 regarding the approval of methodological norms for the application of Government Ordinance no. 69/2002 regarding the legal regime of the electronic identity card, republished, as well as the form and content of the electronic identity card, with subsequent amendments and additions[19];
11. Government Decision no. 220/2006 for the approval of the Working Norms regarding the procurement and transmission abroad of certificates and extracts from civil status documents, as well as data regarding the domicile and residence of certain persons[20];
12. Government Ordinance no. 33/2002 regarding the regulation of the issuance of certificates and certificates by central and local public authorities, approved with amendments and additions by Law no. 223/2002[21];
13. Law no. 105/2022 for the amendment and completion of Law no. 119/1996 regarding civil status documents, as well as for the repeal of Government Ordinance no. 41/2003 regarding the acquisition and administrative change of the names of natural persons[22];
14. Law no. 248/2005 regarding the regime of free movement of Romanian citizens abroad, with subsequent amendments and additions [23];
15. Law no. 544/2001 regarding free access to information of public interest, with subsequent amendments and additions[24];
16. Government Ordinance no. 27/2002 on the regulation of the petition settlement activity, with subsequent amendments and additions [25];
17. Law no. 202/2010 regarding some measures to accelerate the resolution of processes[26];

[17]Published in the Official Gazette, Part I no. 383 of May 4, 2006.
[18]Republished in the Official Gazette, Part I no. 844 of September 15, 2004.
[19]Published in the Official Gazette, Part I no. 1113 of November 27, 2004.
[20]Published in the Official Gazette, Part I no. 205 of March 6, 2006.
[21]Published in the Official Gazette, Part I no. 88 of February 2, 2002.
[22]Published in the Official Gazette, Part I no. 412 of April 29, 2022. Government Ordinance no. 41/2003 regarding the administrative acquisition and change of the names of natural persons, with subsequent amendments and additions, in force from February 2, 2003 until May 1, 2022, when it was repealed by Law no. 105/2022.
[23]Published in the Official Gazette, Part I no. 682 of July 29, 2005.
[24]Published in the Official Gazette, Part I no. 663 of October 23, 2001.
[25]Published in the Official Gazette, Part I no. 84 of February 1, 2002.
[26]Published in the Official Gazette, Part I no. 714 of October 26, 2010.

18. O.U.G. no. 97/2005 regarding the record, domicile, residence and identity documents of Romanian citizens, republished, with subsequent amendments and additions[27];
19. O.U.G. no. 82/2012 for the amendment and completion of some normative acts regarding the record of persons, the identity documents of Romanian citizens, as well as the residence documents of citizens of EU member states and the European Economic Area residing in Romania[28];
20. H.G. no. 727/2013 regarding the application of the Methodological Norms for the implementation of the provisions of Convention no. 16 of the International Civil Status Commission regarding the issuance of multilingual extracts of civil status documents, signed in Vienna on 09/08/1976[29];
21. Law no. 235/2013 regarding the approval of GEO no. 82/2012 for the amendment and completion of some normative acts regarding the record of persons, the identity documents of Romanian citizens, as well as the residence documents of citizens of EU member states and the European Economic Area residing in Romania [30];
22. H.G. no. 801/2016 for establishing the procedures for collecting and deleting the data of persons with declared identity, as well as for the modification and completion of some normative acts regarding the uniform application of the provisions in matters of civil status and records of persons[31];
23. Law 287/2009 Civil Code, republished [32];
24. O.U.G. 57/2019 regarding the Administrative Code [33];
25. Regulation (EU) no. 679/2016 for the protection of natural persons with regard to the processing of personal data and regarding the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation)[34];
26. Regulation (EU) 2016/1191 of the European Parliament and of the Council of 06.07.2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain official documents in the European Union and amending Regulation (EU) no. 1042/2012[35];
27. Law no. 162/2020 for the amendment and completion of normative acts that include provisions regarding the record of persons and identity documents of Romanian citizens [36].

[27]Republished in the Official Gazette, Part I no. 719 of October 12, 2011.
[28]Published in the Official Gazette, Part I no. 838 of December 12, 2012.
[29]Published in the Official Gazette, Part I no. 608 of September 30, 2013.
[30]Published in the Official Gazette, Part I no. 442 of July 19, 2013.
[31]Published in the Official Gazette, Part I no. 883 of November 3, 2016.
[32]Republished in the Official Gazette, Part I no. 505 of July 15, 2011.
[33]Published in the Official Gazette, Part I no. 555 of July 5, 2019.
[34]https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32016R0679&from=EL
[35]https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32016R1191
[36]Published in the Official Gazette, Part I no. 698 of August 4, 2020.

Thus, the General Directorate for Personal Records is a specialised body of the central public administration, which operates within the Ministry of Administration and Interior, being established in 2009, by abolishing the National Inspectorate for Personal Records, in accordance with the provisions of Law no. 329/2009 regarding the reorganisation of some public authorities and institutions, the rationalisation of public expenses, the support of the business environment and the observance of framework agreements with the European Commission and the International Monetary Fund, and Government Decision no. 1367/2009 regarding the establishment, organisation and operation of the Directorate for the Records of Persons and the Administration of Databases.

The records of Romanian citizens domiciled in the country are kept according to the principle of their place of residence, and of Romanian citizens domiciled abroad according to the principle of the last domicile held in the country and according to the residence declared in Romania.

As regards the community public services for records of persons, they are organised at the level of the local councils of the communes, cities and municipalities, as well as at the level of the county councils, respectively of the municipality of Bucharest, being established under their subordination.

According to the provisions of art. 4 para. (1) from Government Ordinance no. 84/2001 regarding the establishment and operation of community public services for records of persons, approved with amendments and additions by Law no. 372/2002, with subsequent amendments and additions, as amended by art. I point 2 of the Government Emergency Ordinance no. 50/2004 for the amendment and completion of some normative acts in order to establish the organisational and functional framework corresponding to the activities of issuing and recording identity cards, civil status documents, simple passports, driving licenses and vehicle registration certificates, approved with amendments and additions by Law no. 520/2004, with the subsequent amendments and additions, were established under the subordination of the local councils of the communes, cities and municipalities, local community public services for records of persons, through the reorganisation of the civil status compartments of the local councils' own apparatus and of the local records formations of the population from the structure of the Ministry of Administration and Interior.[37]

In accordance with Article 10 of Ordinance 84/2001 regarding the establishment, organisation and operation of public community services for records of persons The general directorate administers and manages the national information system for records of persons, coordinates and methodologically controls the community public services for records of persons and cooperates with the Consular Department within the Ministry of Foreign Affairs in in view of the methodological guidance of the record-keeping activity of the persons carried out at the level of diplomatic missions and career consular offices of Romania abroad.

[37]In Timişoara, Romania, the community public service for people's records can be found on the official website of the Timişoara City Hall under the aegis of "People's Records". https://www.primariatm.ro/evpers/

Community public services for the registration of persons ensure both the drawing up, keeping, recording and issuing of civil status documents, identity cards, electronic identity cards and voter cards, as well as carrying out the activities of receiving applications and issuing passports simple, driving licenses, vehicle registration certificates and plates with registration numbers, in a single counter system.

According to art. 5 of the aforementioned normative act, local community public services have the following main attributions:

a) draw up, keep records and issue civil status certificates;
b) register the acts and facts of civil status, as well as the mentions and changes made in the civil status, in the domicile and residence of the person, under the conditions of the law;
c) draw up and keep civil status registers, under the law;
d) draw up, complete, rectify, cancel or reconstitute the civil status documents and any entries made on the civil status documents, under the law;
e) updates the National Registry of Persons with the identification data and addresses of citizens who have their domicile within the territorial jurisdiction of the respective community public service;
f) provides, within the national information system of population records, necessary data for updating the permanent Register of population records;
g) uses and makes use of the National Registry of Persons;
h) provide, in accordance with the law, the identification and address data of the person to central, county and local public authorities and institutions, economic agents and citizens;
i) finds contraventions and applies sanctions, according to the law;
j) receive, in a one-stop shop system, the applications and documents necessary for the issuance of identity cards, voter cards, simple passports, driving licenses, registration certificates and plates with vehicle registration numbers and forward them to the community public services counties for records of persons, community public services for the issuance and registration of passports, respectively community public services driving permit regime and vehicle registration;
k) receive from the competent community public services identity cards, voter cards, simple passports, driving licenses, registration certificates and plates with vehicle registration numbers, which they issue to applicants;
l) keep records for each category of issued documents.

Regarding the financial and material insurance, article 20 of the aforementioned normative act states that the financing of the current and capital expenses of the community public services for records of persons, which operate as public institutions with legal personality, is ensured from own revenues and subsidies of to the local budgets, and the financing of current and capital expenses of the community public services for the registration of persons, without legal personality, is ensured from the local budgets.

Thus, the own revenues of the community public services provided above come from the amounts collected from the activities of issuing documents, by capitalizing on the forms used in the process of issuing them and by providing, in accordance with the law, the data relating to the person, as well as from donations and sponsorships.[38]

Regarding the staff working in these public institutions, we mention that according to art. 24 the police officers who carry out their activity within the territorial structures of computerised records of the person within the General Directorate of Computerised Records of the Person are seconded to the community public services of records of persons, under the law.

Furthermore, the contractual staff assigned to the community public services for personal records, originating from the territorial structures of computerised personal records within the General Directorate of computerised personal records, are taken over by the Ministry of Administration and Interior and with the same date they are detached, under the conditions of the law, at the community public services for the registration of persons, keeping all their previously acquired rights, following that the rights specific to the contractual personnel in the national defence sector, public order and national security from which they benefit shall be granted by the Ministry of Administration and Interior from the chapter 55.01 "Public order and national security".

The staff of the community public services for the registration of persons is made up of police officers and contract staff, seconded from the Ministry of Administration and Interior for a period of 6 years, with the possibility of extending the period of secondment, with their consent, as well as civil servants and contract staff.

Proposal for a Regulation of the Council of the European Union on Jurisdiction, Applicable Law, Recognition of Court Decisions and Acceptance of Authentic Documents in Parentage Matters and on the Creation of a European Parentage Certificate

The European Commission, on December 7, 2022, published a Proposal for a Regulation of the Council of the European Union on jurisdiction, applicable law, recognition of court decisions and acceptance of authentic documents in parentage matters and on the creation of a European parentage certificate.[39]

Art. 71 paragraph (1) of the Proposal for the Regulation stipulates that Member States shall communicate the following information to the Commission:

a. The authorities empowered to draw up or register authentic documents in matters of filiation, as mentioned in article 4 point 6;
b. The courts and authorities competent to issue certificates, as mentioned in articles 29, 37 and 45, and the courts and authorities competent to correct certificates, as mentioned in article 38;

[38]See Decision no. 386/2012.
[39]https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52022PC0695.

c. Courts competent to deal with applications for a judgment finding that there are no grounds for refusal of recognition in accordance with Article 25 and courts competent to deal with applications for refusal of recognition in accordance with Article 32 and appeals against decisions court rulings on such refusal requests in accordance with Articles 33 and 34 respectively;
d. The courts and authorities competent to issue the European Certificate of Parentage under Article 51, as well as the courts competent to resolve the appeals referred to in Article 56.

In the event that this Regulation of the Council of the European Union regarding competence, applicable law, recognition of court decisions and acceptance of authentic documents in matters of filiation and regarding the creation of a European filiation certificate will be adopted, Romania has the obligation to notify the following competent authorities:

1. The authorities empowered to draw up or register authentic documents [40] in matters of filiation;
2. The competent authority of the Member State of origin which issues, at the request of a party, a certificate regarding an authentic act establishing parentage with binding legal effects, using the form appearing in Annex II. (art. 37 paragraph 1);
3. The competent authority from the Member State of origin, which corrects or withdraws the attestation, upon request, or ex officio if, due to a material error or omission, there is a discrepancy between the authentic and attested document and if he was unreasonably released, taking into account the requirements set out in article 37. (art. 38 paragraph (1) and paragraph (2);
4. The court in a member state of origin, which issues, at the request of a party, a certificate regarding a court decision in matters of filiation, using the form appearing in Annex I. (art. 29 para. 1);
5. The territorial competence of the court communicated to the Commission by each member state (art. 25 par. 2);
6. The court that the member state communicated to the Commission for filing the appeal or for the use of the right of appeal (art. 33 paragraph 2);
7. The courts before which the said appeal or subsequent appeal could be brought against a court decision pronounced regarding the appeal or appeal previously used (art. 34);
8. The issuing authority that "issues the certificate without delay, in accordance with the procedure provided for in this chapter, when the elements to be certified have been established in accordance with the law applicable to the establishment of parentage. It uses the form in Annex V." (art. 51).

[40] According to art. 4 pct (6).

Conclusions

We propose, *de lege ferenda*:

1. The establishment in Romania of a competent authority specialised in the matter of family relations with an element of foreignness and which would include the authorities required in art. 71 of this Regulation Proposal;
2. The establishment in Romania of specialised courts for minors and family according to art. 41 of Law no. 304/2022 regarding judicial organisation. In the event of the establishment of these specialised tribunals, family relationships with an element of implicit foreignness would also be taken into account, thus their competence stipulated in the Proposal for a Regulation of the Council of the European Union regarding competence, the applicable law, the recognition of court decisions and accepting authentic parentage documents and creating a European parentage certificate.

Currently, in Romania we have only one Court for Minors and Family in the city of Brasov, which was established by Order of the Minister of Justice no. 3142/C/November 22, 2004 and started operating in the municipality of Brașov, on the same date.[41] However, this court according to art. 71 paragraph (1) of the Proposal of the Regulation could not have powers in the matter of issuing a certificate regarding an authentic act that establishes parentage with binding legal effects because the jurisdiction of the specialised court includes civil cases - in the first instance (litigations regarding placements and adoptions), and in appeal in the matter of minors and family pronounced by the courts of its territorial jurisdiction.

Regardless of the arguments for and against the Proposed Regulation regarding filiation, in relation to the fact that in order to promote the Union's object of creating, maintaining and developing an area of freedom and justice in which to ensure the free movement of people, access to justice and full respect for fundamental rights, Commission President Mrs von der Leyen stated in her 2020 State of the Union address that "who is a parent in one country is a parent in all countries"[42], we appreciate that the appropriate perspective would have been "who is a CHILD in one country is a CHILD in all countries" taking into account the supremacy of the child's best interest.[43]

[41]https://portal.just.ro/1372/SitePages/prezentare.aspx

[42]For details regarding maternity leave, paternity and raising and child care, see Dornean Păunescu (2019). Regarding the child's right to the state allowance, see Dornean Păunescu (2021).

[43]Anitei & Dornean Păunescu (2023), article presented at El IX Congreso Internacional de Derecho Internacional Privado de la Universidad Carlos III de Madrid, dias 4 y 5 de mayo de 2023, and Dornean Păunescu (2024).

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Fair Satisfaction due to Violations of Patients' Rights in Healthcare

*By Anka Mohorič Kenda**

This article explores and presents the meaning of the award of just satisfaction for breaches of patients' rights that interfere with fundamental human rights and the personal integrity of the individual in the field of healthcare. The research is based on well-established methods of legal science, using historical, normative-dogmatic, comparative, axiological and sociological methods. This article reveals and presents a view on the normative regulation of the field of scientific study and points out the shortcomings of the regulation of the judicial protection of rights in health care in the Republic of Slovenia. The study concludes that the interference with a patient's right protected by law results in an interference with the patient's private life, which is why the court should mitigate the ongoing violation and its consequences without undue delay. The patient should be able to seek judicial protection of his or her rights in the healthcare system within the national system through the establishment of an institute of just satisfaction under Article 41 The European Convention on Human Rights (ECHR). The instrument of just satisfaction, as provided for by the ECHR and developed by The European Court of Human Rights (ECtHR), should be used as an important remedy in cases of violation of a patient's rights where no other immediate judicial remedy is available. It remains open to debate for which violations of patients' rights just satisfaction should be granted and in what procedure in order to ensure its swift effect.

Keywords: *Just satisfaction; non-pecuniary damage; criteria for non-business liability; exceptional circumstances; mitigation of the harmful consequences*

Introduction

The extreme importance of patients' rights issues in modern society is demonstrated by the numerous cases of ECtHR[1] judgments whose interference with fundamental human rights violates the protection and interests of patients' rights. Although the "right to health" - as such - is not enshrined among the rights guaranteed by the ECHR and its protocols[2], the ECtHR has repeatedly emphasised in its decisions that States have a duty to protect the lives of those within their

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[1]ECtHR *Vavřička and Others v. The Czech Republic*, no. 47621/13, 8.. 2021, para. 27; ECtHR *Polat v. Austria* no. 12886/16, 20. 7. 2021, para. 51; ECtHR *Salakhov and Islyamova v. Ukraine*, no. 28005/08, 14. 6. 2013, para. 180.

[2]See also ECtHR *Vasiliyeva v. Bulgaria*, no. 23796/10, 17.3.2016, para. 63.

jurisdiction and to refrain not only from "unintentional" deprivation of life, but also to take appropriate measures to protect the lives of those within their jurisdiction[3].

Health and its protection are a right defined in Article 35 of the Charter of Fundamental Rights of the European Union. EU Member States which are signatories to the Charter of Fundamental Rights of the European Union are required to implement and guarantee this right through national legislation. The principles derived from this Article are based on Article 168 TFEU[4] and Articles 11 and 13 of the European Social Charter. The protection of human rights in the field of health care is an important element of state action. In democratic countries, human life and health are recognised as the highest social values, with particular emphasis on health care. However, it is often health professionals who violate patients' rights[5].

Under Article 47 of the Charter and Article 19(1) TEU, anyone who has suffered a violation of any of his or her rights and freedoms under EU law has the right to an effective remedy and to an impartial tribunal, in addition to general rules of Article 6 of the ECHR.

The Charter establishes the principle of respect for fundamental rights guaranteed by the general principles of EU law, which both the EU and the Member States must respect. The requirement for judicial protection set out in the Charter reflects a general legal principle based on a constitutional tradition common to EU Member States. ECtHR in Strasbourg and other regional human rights tribunals represent a historically important breakthrough in the enforcement of human rights as an international jurisdiction. They allow individuals to bring their own state before an international, impartial tribunal for violations of their fundamental human rights[6]. At a principled level, upholding respect for human rights and fundamental freedoms is a foreign policy priority for many countries[7].

In the Health care sector in the Republic of Slovenia, human rights are limited by national legislation on patients' rights, which sets out the rights and responsibilities of patients, healthcare professionals and healthcare providers. Professional responsibility of health professionals is the ability to make binding decisions, accepting responsibility for breaches of professional rules and professional standards. They are committed to the realisation of patients' rights and legally protected interests guaranteed by the ECHR, subject to rules of professional conduct[8] (positive accountability) and liability for legal misconduct (negative accountability).

The ECtHR is empowered under Article 41 ECHR to award just satisfaction to those whose Convention rights have been violated. The determination of the amounts awarded to the complainants as just satisfaction is not one of the main tasks of the Court, but is a secondary task under Article 19 ECHR. If the ECtHR

[3]See *Calvelli and Ciglio v. Italy*, [GC], no. 32967/96, para. 51, ECHR 2002-I, and *Vo v. France* [GC], no. 53924/00, para. 90, ECHR 2004-VIII.
[4]Ibid., para. 1.
[5]Yanovska, Horodovenko & Bitsai (2019) at 72.
[6]Petrič (2010) at 407.
[7]Petrič (2010) at 243.
[8]Law on health care (ZZDej), Article 55.

considers that the amount to be awarded is necessary, the court will make an assessment on the basis of fairness, which involves flexibility and an objective assessment of what is just, fair and reasonable in all the circumstances of the case. Not only on the basis of the applicant's position and his/her possible contribution to the situation complained of, but also in the light of the circumstances in which the breach occurred. In doing so, the ECtHR draws on the case-law of similar infringements and considers them as a starting point for determining the appropriate amount to be awarded in the circumstances of the individual case. The criteria taken into account by the ECtHR in determining the amount to be awarded are: (I) the nature and gravity of the violation established, (II) its duration and effects, (III) other circumstances to be taken into account in the particular case (such as whether there have been several violations of protected rights, whether the State has awarded the applicant a sum of money for the damage caused, whether it has adopted any measure which could be considered the most appropriate remedy for the damage, etc.).

In the Republic of Slovenia, there are no specific legal provisions in place that would allow an individual who has suffered a violation of his or her rights to assert the right to just satisfaction within the meaning of the ECHR. According to the Constitutional Court of the Republic of Slovenia (CCRS), such a right can only be decided upon by a court in a civil proceeding under the general rules of the law of damages, which are regulated by the Code of Obligations[9] (CC). The recognised right to compensation ensures that everyone has the right, in accordance with the law, to claim compensation for the damage caused to him by the unlawful and impermissible conduct of the State and its institutions[10]. Effective judicial protection of the right to a trial within a reasonable time is guaranteed under the case-law of the ECtHR only if it also includes protection that provides just satisfaction. The ECtHR grants just satisfaction to an individual who has suffered a violation of his or her rights in proceedings that have already been concluded. It is a financial compensation awarded by the ECtHR to the injured party for the State's failure to comply with its positive obligation to ensure that the system or organisation of procedures is such as to enable the individual to obtain a decision from a court within a reasonable time. Given the nature of the right itself (a right of a procedural nature), this means that the State must guarantee it in a substantive sense. It does not necessarily mean that, in the event of a breach, the individual has acquired a right to a monetary claim against the State based on the rules of tort law. The latter does not directly provide for such a legal consequence by law. It could only be established by analogy, that there is a legal vacuum, in the area of the payment of pecuniary compensation for non-pecuniary damage[11].

Slovenian case law recognises that compensation can only be obtained for legally recognised damage. The Act on the Protection of the Right to a Trial without Undue Delay (ZVPSBNO)[12] regulates the payment of monetary compensation for damage caused solely as a result of a violation of the right to a

[9]Law on health care (ZZDej), Article 179, para. 2.
[10]Ljubljana Higher Court, Judgement, II Cp 5167/2007, 16.1.2008.
[11]Ljubljana Higher Court, Judgement II Cp 2340/2009, 23.9.2009.
[12]Hereinafter the Slovenian abbreviation ZVPSBNO.

trial without undue delay[13]. There are no specific legal provisions in the existing legal framework which would allow an individual who has been deprived of the right to a trial within a reasonable time while proceedings are pending and who has suffered damage in this respect to claim just satisfaction within the meaning of the ECHR[14].

The possibility of the payment of financial compensation for the purpose of just satisfaction for the violation of a human right recognised by the ECHR and its Protocols is not expressly regulated by the ZVPSBNO. This does not mean, however, that the legally recognised right to a trial within a reasonable time is not regulated in our legal order. The only question is whether it is sufficiently regulated. The CCRS has taken the view that just satisfaction for a violation of the right to a trial within a reasonable time within the meaning of the ECHR does not constitute compensation in the classical sense under the criteria of civil liability for pecuniary and non-pecuniary damage. The same applies to compensation under Article 26 of the Constitution of the Republic of Slovenia, which is a form of compensation whose primary purpose is to award damages for the State's failure to comply with its positive duty to ensure that the system or organisation of procedures is such as to enable the individual to obtain a decision within a reasonable time[15].

Literature Review

In the area of the regulation of the judicial protection of rights in healthcare, previous studies by foreign authors are based on: (I) the study of the role of the court - judicial responsibility in the protection of the right to health as the highest attainable standard of health, especially in crisis and emergency situations - Covid-19[16], (II) analysing monitoring data on access to justice as a key component of the universally recognised right to health[17], and (III) examining the power of law to achieve the highest attainable standard of health[18]. Yamin & Lander[19] note that judicial decisions in the context of health rights litigation have far-reaching consequences, not only directly for litigants, but also indirectly for the wider population. The rule of law and accountability, and consequently access to effective remedies, are central aspects of human rights-based approaches to health.

The researchers have sourced information for the study of access to justice as a fundamental right of the individual protected by the EU acquis from: (I) a review of the relevant case law of the courts, (II) a literature review, (III) analyses of country reports and their findings, and the final recommendations of the expert working groups analysed by each country in relation to access to justice and the

[13]Ibid., Article 15, para.1.
[14]CCRS, decision U-I-65/05, 22.9.2005, para. 8.
[15]See CCRS Judgement U-I-65/05, 22.9.2005, para. 9.
[16]Flood Colleen & Bryan (2020) at 177–196; Gutiérrez Silva (2023); Pollard Sacks (2021).
[17]Pautassi (2018) at 185–197.
[18]Gostin, Monahan, Kaldor, DeBartolo, Friedman, Gottschalk, Kim, Alwan, Binagwaho, Burci, Cabal, DeLand, Evans, Goosby, Hossain, Koh, Ooms, Roses Periago, Uprimny & Yamin (2019).
[19]Yamin & Lander (2015) at 312.

definition of guarantees for access to justice in health matters. In the context of the general definition of the fundamental principles of justice, there are a number of studies by authors that clarify and highlight the role and importance of the application of the general principle of effective justice. The authors' studies are based on reflection and interpretation: (I) the importance of the procedural exercise of the right to effective judicial protection[20], (II) the role of the court in the implementation of the principle of effective judicial protection[21], (III) methodologies for assessing the independence and accountability of the judiciary[22], and (IV) the role of constitutional traditions in shaping effective justice in the EU and its impact on national jurisdictions[23].

Van Belle[24] argues that, following the EU's move to implement the ECHR, the fundamental principles of judicial protection are directly implemented through the protection of fundamental human rights and freedoms. Both the Council of Europe and the EU independently guarantee human rights at the same supranational level. The Council of Europe, on the basis of the ECHR and through the ECtHR, carries out an external review of acts, actions and omissions 'inter alia' of all EU Member States. Wojtyczek[25] points out that the ECtHR has developed a very rich case law which establishes a minimum of human rights protection in Europe. He also states that case law is indispensable in clarifying the meaning of the provisions of the ECHR.

Camp Keith[26] points out that an independent judiciary can play an important role in guaranteeing constitutionally protected human rights and is an indispensable link in the mechanism for ensuring individual protection against human rights abuses by the state. Conkle[27] discusses the right to effective judicial protection in relation to the protection of human rights in the context of examining selected aspects of constitutional law and the exercise of judicial review in cases in which constitutionally protected individual rights are invoked. On the other hand, Van Belle[28] and Contini & Mohr [29] examine procedural and institutional innovations of the EU acquis and the ECHR system, generally analysing procedural innovations before the ECtHR.

The Slovenian legal literature cites a number of authors who clarify the rationale and, within the general definition of the foundations of judicial protection, interpret and justify: (I) the right to effective judicial protection[30]; (II) the term "judicial protection"[31] and (III) the right to an impartial, independent and

[20]Arroyo (2021); Görisch (2017); Szente (2017); Yamkovyi (2001); Garth & Cappelleti (1978).
[21]Smokoyych (2018); Lacchi (2016); Bondareva & Ahbra (2010); Ahbra (2010).
[22]Van Dijk & Vos (2018).
[23]Gentile (2022); Bonelli (2019) ; Ravo (2012); Norbert (2005) ; Marton (2005).
[24]Van Belle (2013).
[25]Wojtyczek (2020) at 241.
[26]Camp Keith (2002).
[27]Conkle (2022).
[28]Van Belle (2013).
[29]Contini & Mohr (2007).
[30] Avbelj & Šturm (2019) at 50 ; Šturm (1998); Galič (2019) at 215; Jambrek & Černič (2014).
[31] Legal protection, in Dictionary of legal terminology (2018) at 275.

lawful judge[32]. While some other authors address the exercise of the right to justice from the perspective of the trial in civil and criminal cases[33] as well as in administrative cases[34].

From a theoretical point of view, the right to justice has often been discussed as a fundamental human right. Letnar Černič[35] argues that human rights require an equal approach and equal treatment of all human rights violations and the introduction of preventive measures to prevent future violations. Pavčnik[36] points out that fundamental (human) rights constrain state power and define the limits within which it can move. He emphasises that fundamental rights are legally protected fundamental entitlements in relation to the state and its organs, as well as in relation to individuals and other legal entities. Petrič[37] highlights the importance of the ECtHR and other regional human rights courts as an expression of a historically significant shift in the assertion of human rights as an international jurisdiction. The ECHR enables an individual to sue his or her own state for violation of (his or her) rights before an international, impartial tribunal.

Judicial protection of healthcare rights is also ensured through the application of tort and criminal liability. This has been discussed in the RS in the area of liability for damages, in particular by Cigoj[38]; Jadek Pensa[39]; Plavšak (2003)[40]; Plavšak, Juhart & Vrenčur[41]; Ivanjko[42]; Škrk Berger[43]; Ovčak Kos & Penko[44]; Rijavec[45]; Žnidaršič Skubic[46]; Možina[47]; Fikfak[48]. In the field of criminal liability, Novak[49] and Zobec[50] , have argued and discussed the relevance of a judge's proven unlawful conduct in relation to a trial. The tort and criminal liability of a doctor or other health professional for crimes against human health has been discussed in the context of the definition of criminal liability for medical errors by Korošec & Novak[51]; Korošec & Balažic[52]; Pitako, Valenčič, Korošec, & Balažic[53]; Jaklič & Šepec[54].

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[32] Čebulj (2019) at 208; Novak (2019) at 273; Kovač (2019); Pavčnik (2019); Novak (2003).
[33]Bošnjak & Žaucer Hrovatin (2019); Galič (2019).
[34]Kovač (2019); Smrekar, (2019): Kerševan (2020); Steinman (2019); Farmany (2019); Kerševan & Androjna (2017); Pirnat (2013); Potisek (2014); Jerovšek (2002).
[35]Letner Černič (2017) at 6.
[36]Pavčnik, (2019) at 164.
[37]Petrič (2010) at.407.
[38]Cigoj (1978) at 15.
[39]Jadek Pensa (2003).
[40]Plavšak (2003) at 144.
[41]Plavšak, Juhart & Vrenčur (2009) at 474.
[42]Ivanjko (2010) at 178.
[43]Škrk Berger (2010) at 28.
[44]Ovčak Kos, Božič Penko (2017).
[45]Rijavec (2017) at 44.
[46]Žnidaršič Skubic (2018) at.81.
[47]Možina (2019) at 258.
[48]Fikfak (2020) at 341.
[49]Novak (2019).
[50]Zobec (2015) at 116.
[51]Korošec & Novak (2009) at 71.
[52]Korošec & Balažic (2019) at 67.
[53]Pitako, Valenčič, Korošec & Balažic (2019) at 94.

Methodology/Materials and Methods

The methodological approach of this research is generally based on the already established methods of legal science, using historical, normative-dogmatic, comparative, axiological and sociological methods. An analytical and descriptive approach was used to explain the individual findings, and the rules of logical reasoning were followed. In the study of legal content, both inductive (from the study of individual provisions to teleological interpretations of laws) and deductive (the study of legal practice, precedents and the material legal sources used) modes of reasoning and inference were applied in a meaningful way. In the concluding part of this research, the findings and conclusions of the research study are presented in the synthetic phase of the study. The research findings are substantiated by applying established methods of legal science, which are interrelated.

Results

Protection of Patients' Rights

The enforcement of constitutional rights is extended through case law in the doctrine of fundamental human rights to the field of health care, where the protection of patients' rights is implemented. The protection of patients' rights and (indirectly) the exercise of the right to health protection in national legislation *lex specialis* is governed by the Law on Patients' Rights (ZPacP)[55].The current legal regime in the RS only provides legal protection to the patient on the basis of the provisions laid down in the ZPacP[56], by exercising the right to have a violation of the patient's rights addressed. This gives the patient the possibility to exercise the right to have the infringement of patient's rights addressed in the procedure for the request for the protection of patient's rights (in the procedure for the request for the first and/or second hearing of the infringement)[57]. Whereas the patient is guaranteed the right to judicial protection exclusively in administrative litigation, where the protection of the patient's legal position is ensured against final administrative acts which interfere with the patient's rights and legal interests[58]. This means that the patient is only guaranteed the right to a judicial remedy once the procedure for requesting a second hearing before the Commission of the Republic of Slovenia on the infringement of the patient's rights has been completed, and not while the infringement has occurred and is still ongoing.

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[54]Jaklič & Šepec (2021) at 30.
[55]Further in this article I use Slovenian abbreviation ZPacP; Ibid., Article 5.
[56]ZPacP, Article 5.
[57]ZPacP, Article 47, Article 48.
[58]ZPacP, Article 79, para. 2; Administrative Dispute Act (ZUS-1), Article 2, para. 1.

Galič[59] submits that the right to a fair trial cannot be understood as a formal right, nor as a theoretical possibility of access to a court. The latter must ensure the effectiveness of justice both at the substantive level (ensuring the protection of a right to which a party is entitled under substantive law) and in the conduct of the proceedings. Case-law shows that the time limits set by law for the courts to give a decision are linked to the requirement to ensure effective judicial protection, not just fast justice[60]. A procedure is effective only if it ensures the substantive legal correctness of the court decision, and thus the legal protection of an existing right[61].

Exercising the right to judicial protection in a case where there has been an alleged infringement and the procedure has already been completed does not constitute judicial protection. The CCRS in Case U-I-65/05[62] relied on this very fact, equating it with a situation where the person affected has had no or no access to justice at all, "justice delayed is justice denied". The legislator adopted the ZVPSBNO[63] for this purpose, in view of the shortcomings highlighted. It provided for the possibility of seeking just satisfaction only in those cases where, despite the party's efforts to expedite the judicial proceedings, he is not granted a trial within a reasonable time. It does not apply, however, with a view to exercising the right to a trial without undue delay, directly when the infringement is still ongoing and depending on the degree of seriousness of the infringement (which may affect the deterioration of the patient's state of health). In establishing the system of judicial protection of the right to a trial without undue delay in the ZVPSBNO, the legislator pursued the aim of achieving the protection of this right by means of expedited legal remedies. The Act allows a party to a judicial proceeding, a party to a case under the law governing non-judicial proceedings and an injured party in a criminal proceeding, to have his rights, obligations and the charges against him in his case before the court decided by the court without undue delay [64].

According to the case law of the ECtHR, effective judicial protection of the right to a trial within a reasonable time is only guaranteed if it includes the protection of "just satisfaction", which is awarded by the Court to an individual who has suffered a violation of his or her rights in proceedings that have already been concluded. It is a pecuniary compensation awarded by the ECtHR to the injured party for the State's failure to comply with its positive obligation to ensure that the system of procedures is organised in such a way as to enable the individual to obtain a decision of the Court within a reasonable time. The institution of just satisfaction does not mean compensation in the classical sense according to the criteria of civil liability for pecuniary or non-pecuniary damage, which is also the case for Article 26 of the Constitution of the Republic of Slovenia[65]. There are no

[59]Galič (2019).
[60]Administrative Court of the Republic of Slovenia, Court Decision I U 1145/2015, 14. 8. 2015, para. 99.
[61]Galič (2004).
[62]CCRS Judgement U-I-65/05, 22. 9. 2005, para. 8.
[63]Ibid., Article 1, para. 1.
[64]Ibid., Article 2.
[65]CCRS Judgement U-I-65/05, 22.9.2005, para. 13.

specific legal provisions in the Republic of Slovenia which would allow an individual who has suffered a violation of his or her rights to claim the right to just satisfaction within the meaning of the ECHR[66].

If you have been deprived of your right to a trial within a reasonable time and have suffered damage as a result, you can seek redress by bringing an action in court. According to the CCRS, such a right can only be decided by a court in civil proceedings under the general rules of the law of damages governed by the Civil Code[67]. The recognised right to compensation ensures that everyone has the right, in accordance with the law, to claim compensation for the damage caused to him by the unlawful wrongful conduct of the State and its institutions[68]. Given the nature of the right itself (a right of a procedural nature), this implies that the State must provide it in a substantive sense. It does not necessarily mean, however, that in the event of a violation, the individual has acquired a right to a pecuniary claim against the State based on the rules of tort law. The latter does not directly provide for such a legal consequence by law. It could only be established by analogy, that there is a legal vacuum, in the area of the payment of pecuniary compensation for non-pecuniary damage[69].

Consequences of Infringements for Non-pecuniary Damage

The mitigation of the consequences of breaches for non-pecuniary damage is one of the classic controversies of the legal system, whether it includes, rejects or offers coherent solutions, leaving room for endless doctrinal and judicial disputes[70]. The individual approach to the remedy of the breach of a right and the award of monetary compensation for non-pecuniary damage in the form of just satisfaction, in the field of health care, focuses on the protection of human rights and the resulting sub-normative rights of patients and the existence of liability for damages. The existence of damage in healthcare and the right to compensation for it are among the legally protected goods which are protected by the Constitution and laws at national level in a democratic society, and by the ECHR and the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (Oviedo Convention on Human Rights and Biomedicine[71]) in the context of European Union law.

The ECtHR and the CJEU rarely award compensation for non-pecuniary damage in the context of tort law or liability law in general, non-pecuniary damage refers to damage that is difficult to qualify in monetary terms. This is because the occurrence of such damage is of a qualitative nature and is not directly linked to

[66]See ECHR, Article 41.
[67]Ibid., Article 179, para. 2.
[68]Ljubljana Higher Court, Judgement II Cp 5167/2007, 16.1.2008.
[69]Ljubljana Higher Court, Judgement II Cp 2340/2009, 23.9.2009.
[70]Truichici & Neagu (2020).
[71]Interpretative Report - ETS 164 - Human Rights and Biomedicine (Convention), 1997, Article 24.

personal property, wealth or income[72]. By awarding compensation for non-pecuniary damage, the ECtHR recognises that the violation of a fundamental human right has resulted in non-pecuniary damage, such as mental and physical suffering, which in the broadest sense reflects the gravity of the damage. It is therefore often reasonable to presume a causal link between the alleged violation and the moral harm. Applicants do not need to provide any further evidence of their suffering. It is in the nature of non-pecuniary damage that it cannot be precisely calculated and therefore does not need to be precisely quantified or substantiated. The applicant may leave the amount of the financial compensation for just satisfaction to the discretion of the ECtHR.

Like EU case law, the case law of national courts is extremely diverse. For example, when national courts in the RS rule on a plaintiff's claim for non-material damage, they rule on negative changes reflected in the plaintiff's state of health, such as: (I) pain (physical[73] and mental[74]), (II) physical and mental suffering[75], (III) emotional perception (fear[76]), (IV) damage to reputation and other damage to personality rights (of natural persons[77] and legal persons[78]), (V) a state of insecurity[79], (VI) loss of opportunities[80] and, last but not least, (VII) loss of pleasure[81].

ECHR, Article 41 - Just Satisfaction

The national legislation of the Republic of Slovenia allows an injured party who has suffered a legally recognised loss as a result of an interference with his or her personality to claim compensation from the person responsible in the form of just pecuniary compensation, in accordance with the conditions and in the manner prescribed by law. Meanwhile, the ECHR protects the interference with the Convention rights and its Protocols. The ECHR provides for liability for interference with a legally recognised human right in the form of monetary compensation for non-pecuniary damage in the form of "just satisfaction" for the violation of a right that interferes with an individual's legal sphere. It is clear from the case-law that just satisfaction is the least justified part (contingency) of the text of the ECtHR's case-law. The ECtHR awards pecuniary compensation for non-pecuniary damage where the damage suffered is the result of an established violation of a human right under the ECHR and its Protocols and where the non-pecuniary damage suffered cannot be remedied by establishing that violation alone[82].

[72]Havu (2019).
[73]Supreme Court of the Republic of Slovenia (SCRS), Judgement II Ips 72/2009, 13.9.2012, para. 8.
[74]Maribor Higher Court, Judgement I Cp 1008/2018, 11.12.2018, para. 9.
[75]SCRS Judgement and decision II Ips 495/96, 22.4.1998.
[76]Koper Higher Court, Judgement Cp 503/2013, 7.11.2013, para. 16.
[77]Higher Labour and Social Court, Decision Pdp 79/2019, 20.3.2019, para. 10.
[78]Higher Labour and Social Court, Judgement Pdp 792/2013, 9.10.2013, para. 15.
[79]CCRS Decision Up-3871/07, U-I-80/09, 1.10.2009, para. 10.
[80]SCRS Decision II Ips 157/2017, 22.11.2018.
[81]SCRS Judgement II Ips 69/2020, 10.12.2019, para. 7.
[82]ECtHR *K.H. and Others v. Slovakia*, no. 32881/04, 6.11.2009, para. 77.

The ECtHR has a wide discretion in regulating the question of compensation for non-pecuniary damage suffered. It awards just satisfaction to the injured party if it finds that there has been a violation of the ECHR and its Protocols; in so far as the domestic law of an EU Member State permits, the court may, if necessary ("if necessary"), award just satisfaction in the form of financial compensation to the injured party, subject to the conditions set out in Article 41 of the ECHR[83]. The precondition for the invocation of the ECHR's protective mechanism is an alleged violation of a right that is reflected in a personal injury to the individual. The ECHR allows the ECtHR to provide the aggrieved party with monetary compensation in the form of just satisfaction (Article 41 ECHR) in addition to establishing and alleging human rights violations[84]. A review of the case law of the ECtHR in those cases relating to non-pecuniary damage (moral damage) shows inconsistency and has been criticised by a number of authors for its lack of reasoning and its unpredictability[85]. Shelton[86] argues that the compensation awarded by the ECtHR for non-pecuniary damage can hardly be understood as anything other than a subjective judgement on the moral worth of the victim and the perpetrator. The ECtHR's explanations do not set out the precise principles, nor do they present the explanations, that lead to its decision in relation to the assessment of monetary compensation for non-pecuniary damage awarded to a victim for interference with an article 41 ECHR right. It is clear from the case law that just satisfaction is the least well-founded part of the text of the ECtHR's jurisprudence.

ECtHR in I. v Finland[87] of 17.7.2008

The Court drew particular attention to the instrument of just satisfaction - it stated that a patient's personal data unambiguously form part of his or her private life (under Article 8(1) ECHR). In this particular case, the Court did not see a sufficient causal link between the established breach (unauthorised access to the patient's medical records) and the alleged pecuniary damage. However, it nevertheless held that the applicant had certainly suffered non-pecuniary damage as a result of the State's failure to adequately protect her medical records (the patient's privacy) against the risk of unauthorised access. The Court considered that just satisfaction would not be secured by a finding of infringement alone and therefore also awarded the appellant compensation on an equitable basis for the non-pecuniary damage suffered. Respect for the confidentiality of medical information is an essential principle in the legal systems of all States Parties to the ECHR. It is essential not only to respect the patient's privacy, but also to preserve the patient's confidence in the medical profession and in health services in general[88].

[83]Škrk Berger, 2010, p.28.
[84]ECtHR *Vilela v Portugal*, no. 63687/14, 5.7. 021, para. 5.
[85]Altwicker Hamor, Altwicker & Peters (2015) at 4.
[86]Shelton (2005) at 20.
[87]ECtHR *I. v. Finland*, no. 20511/03, 17.7.2008, para. 55.
[88]ECtHR *I. v. Finland*, no. 20511/03, 17.7 2008, para. 36–38.

The CJEU has ruled on the question of the right to compensation for damage caused by processing of personal data carried out in breach of Article 82 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (and repealing Directive 95/46/EC (General Data Protection Regulation (GDPR)), in the following case for a preliminary ruling:CJEU in the case of UI v Österreichische Post of 4th May 2023.

In a preliminary ruling in the context of a dispute between UI and Österreichische Post AG (Case C-300/21), the Court of First Instance ruled on the payment of compensation for non-pecuniary damage allegedly suffered by the appellant as a result of the processing by that company of data relating to the political affiliation of persons residing in Austria, in particular that person, even though he had not consented to such processing himself. The Court stated that the existence of damage caused by a breach of Article 82 of the GDPR is one of the conditions for the right to compensation, under which an injured party who has suffered material or non-material damage as a result of a breach of the GDPR has the right to obtain compensation from the controller or processor for the damage suffered. However, the right to compensation under Article 82 of the GDPR[89] may arise for both pecuniary and non-pecuniary damage, without the damage having to reach any degree of seriousness[90]. The Court stated that, in order to determine the number of damages under the right to compensation provided for in that Article, national courts must apply the national rules of each EU Member State concerning the scope of monetary compensation, while respecting the principles of equivalence and effectiveness of EU law[91]. The Court stated that Article 82 of the GDPR[92] indicates that the right to compensation is not conditional on the damage in question reaching a certain threshold of seriousness. Recital 146 of the GDPR[93] states that 'the concept of damage must be interpreted broadly, taking into account the case-law of the Court, in a manner [...] which fully reflects the objectives of the Regulation. It would be contrary to this broad interpretation of the concept of damage favoured by the Union legislator if that concept were limited to damage of a certain gravity"[94].

ECtHR in Šilih v Slovenia[95] of 4.9.2009

The Court referred to the instrument of just satisfaction for damage caused by the length of the trial. It stated that, under Article 2 ECHR, States Parties have a duty to ensure an effective and independent judicial system to establish the causes of, and responsibility for, the deaths of patients, both in the network of public and

[89]GDPR, Article 82.
[90]SEU *UI v. Österreichische Post AG*, no. C-300/21, 4. 5. 2023, para. 45.
[91]SEU *UI v Österreichische Post AG*, no. C-300/21, 4.5.2023, para. 60.
[92]Ibid., para. 1.
[93]Ibid., para. 3.
[94]SEU *UI v Österreichische Post AG*, no. C-300/21, 4.5.2023, para. 46.
[95]ECtHR *Šilih v Slovenia*, no. 71463/01, 9.4.2009, para. 192 - 195.

private health care providers. The State must provide a patient who is the victim of medical negligence with an effective remedy, either in civil proceedings or in conjunction with a remedy in criminal proceedings, to establish the liability of the doctors and health professionals involved who caused the negligence. In that context, the victim of such an act must be granted appropriate civil redress in the form of compensation for the damage caused and/or publication of a judgment or disciplinary action. The Court stated that national legislation in a Member State must be effective in practice and not merely in theory.

Limits and Extent of Adverse Effects

In a series of cases, the ECtHR has highlighted a number of risks that stem from the very essence of the Convention, namely respect for human dignity and human freedom. Human rights, which protect the life, health, safety, physical and mental integrity and dignity of the individual, are fundamental values of a democratic society which the State has a particularly active duty to protect, which means creating opportunities for the most effective exercise of human rights[96].

Respect for human dignity constitutes a binding legal norm in the sense of protecting the personal worth of the individual against unjustified interference, the demands of the State and its society. Article 19 TEU, which was incorporated into the Lisbon Treaty, provides that Member States shall establish legal remedies to ensure effective redress in areas governed by EU law[97]. This obliges EU Member States to guarantee the right of access to justice. The Member States' commitment to the right to access to justice is enshrined in Article 47 of the Charter of Fundamental Rights of the European Union[98], taking into account the interpretation of Articles 6 and 13 of the ECHR[99] and the case law of the ECtHR on this provision.

ECtHR, Fernandes de Olivera v Portugal, 31.01.2019

In relation to the risk of suicide, the Court set out a list of relevant criteria with a risk assessment (to determine whether the authorities knew or ought to have known) that the life of the individual (mostly in police custody or detention) was at real and imminent risk[100]. In view of the nature and development of the case-law, the Court stated that the authorities have a general operational duty in relation to a voluntary psychiatric patient to take reasonable steps to protect him against a real and imminent risk of suicide. The specific measures required depend on the particular circumstances of the case, and those particular circumstances often differ depending on whether the patient is a voluntary or involuntary inpatient[101].

[96]CCRS Judgement Up-555/03, Up-827/04, 6.7.2006, para. 25.
[97]Ibid., para. 1.
[98]Ibid.
[99]Ibid., Article 6, para. 1; Article 13.
[100]Ibid, para. 116
[101]Ibid, para. 124

The Court emphasises that a positive obligation arises if the authorities knew or ought to have known that the person posed a real and immediate risk of suicide. In such circumstances, the Court proceeds from an assessment of whether the authorities have done all that could reasonably be expected of them to prevent that risk from materialising. Thus, the court shall assess whether, in the light of all the circumstances of the case, the risk in question was real and immediate[102].

ECtHR, Osman v the United Kingdom, 28.10.1998

In the case of a threat to life, the Court stated as early as 1998 that the authorities must take operational measures to prevent that threat from materialising, but that this does not apply to all possible threats, even minor ones. It stated that risks arising in the context of health care cannot relieve the State of its obligations to protect patients from the risks to their lives posed by those risks [103].

ECtHR, Lambert and Others v France, 25.6.2015

In its decision, the Court highlighted the notion of quality of life, which acquires significance through the implementation of Article 8 ECHR. It pointed out that "in an era of increasing medical sophistication combined with longer life expectancy, many people are concerned lest they should be forced to remain in old age in a state of advanced physical or mental debility which is at odds with strongly held notions of self or personal identity"[104].

ECtHR, Pretty v the United Kingdom, 29.4.2002

The Court stated that "in the field of medical treatment, a refusal to accept a particular treatment may inevitably lead to a fatal outcome. However, to impose treatment without the consent of a mentally competent adult patient would interfere with the physical integrity of the human being in a manner which makes it possible to invoke the rights protected under Article 8(1) of the Convention"[105].

Under national jurisdiction, the ZPacP gives the patient the right to decide on his/her own treatment, but not how and in what way to be treated. The decision on how to treat a patient is always subject to the professional judgement of the doctor. The doctor establishes the need for treatment by diagnosing the patient. The patient has the right to be informed in advance of all possible methods of treatment, diagnosis and their consequences and effects. He or she has the right to know the diagnosis of his or her illness, the extent, method, quality and expected duration of treatment, and the right to refuse the proposed medical intervention or treatment. A medical intervention is only allowed with the prior consent of the

[102]Ibid, para. 110.
[103]ECtHR Osman *v* The United Kingdom, no. 87/1997/871/1083, 28.10.1998, Reports of Judgments and Decisions 1998-VIII, para. 116.
[104]ECtHR *Lambert and Others v. France*, no. 46043/14, 25.6.2015, para. 142.
[105]ECtHR *Pretty. The United Kingdom*, no. 2346/02, 29.4.2002, para. 63.

patient treated by the intervention and the possible consequences[106]. The patient may (or may not) follow the need for treatment by consenting to the medical treatment[107]. When a doctor makes a diagnosis, this does not constitute treatment, but only a decision on the need for, and the type and extent of, treatment. The doctor is obliged by law to explain to the patient or to the person entitled the manner and extent of the treatment and to take explicit account of the patient's right to participate actively in the choice of treatment after having received the explanation[108].

However, how and by what means can the interest of patient protection be realised in the event of discretionary of a doctor's decision which might not contribute to improving the patient's state of health? Perhaps the legislator should set guidelines and define the responsibilities of the doctor in the context of professional rules, to lay down requirements for transparent documentation of such a decision (which must be based on scientific knowledge and peer-reviewed methods), to ensure access to information (for persons who can legally consent to medical intervention or treatment) and to limit the discretionary power of the doctor within a clear legal framework. The commentary to Article 29 of the ZPacP makes it clear that a doctor who performs a medical procedure on a patient in accordance with this provision derives his explanation for the medical procedure from the presumed will of the patient. He may only perform the procedure if he is satisfied that the patient would not object to such a procedure or to the specific procedure in question. This also means that the doctor's decision is based on the presumption that, if the patient had the capacity to decide for himself, he would certainly have consented to the medical procedure or treatment.

SCRS in Case I Ips 10600/2010-347 of 24th October 2013

It is clear that the transfer of a patient to another health care institution within the network of public health care providers in the Republic of Slovenia (the purpose of which is to ensure appropriate treatment and the exercise of the patient's right to adequate, high-quality and safe health care) would allow for "appropriate doctrinal treatment" and ensure the need for "appropriate therapy"[109].

SCRS in Case I Ips 52609/2010 of 13th February 2020

The Court confirmed that a patient's condition may change as a result of "medical activity by a doctor which is contrary to the rules of medical science and profession and which is manifested in the manner of the perpetrator's work or the means he uses"[110] (e.g. inappropriate treatment, failure to take hygienic precautions or other unscrupulous conduct, etc.).

[106]Ljubljana Higher Court, Decision II Cp 2084/2014, 18.2.2015, para. 10.
[107]SCRS, Judgement VIII Ips 225/2013, 10.2.2014, para. 14.
[108]Administrative Court of the Republic of Slovenia, Judgement I U 1002/2020-22, 11.1.2022, para. 2.
[109]SCRS Judgement I Ips 10600/2010-347, 24.10.2013, para. 6.
[110]SCRS Judgement I Ips 52609/2010, 13.2.2020, para 7.

The merits of the doctor's decision are not given in the form of a final administrative act that affects the patient's legal position. It is also not entirely clear what remedies are available to the patient. This is particularly the case when the person entitled to make a decision under the law wishes to decide on behalf of the patient and to put into practice the requirement for appropriate doctrinal treatment, which would make it possible to request the patient's transfer to another doctor or to a healthcare provider in the network of public health service providers in the Republic of Slovenia. The main purpose of such decision-making is to enable the patient to be cured or to improve his/her state of health or to prevent his/her state of health from (re)deteriorating (in the first place). It cannot be said that the national legal order allows for direct judicial review of such a decision, nor is it entirely clear which competent authority may decide on the eligibility for a medical intervention or treatment by another doctor or a healthcare provider within or outside the public health network in the Republic of Slovenia. The ZPacP does not provide that the patient or insured person may decide independently on the method and type of treatment, but only grants the patient the right to consent independently to the medical intervention or treatment. Thus, the ZPacP grants the patient the right to decide independently on treatment only to a limited extent. The legislator has delegated to the doctor the right to choose the most appropriate treatment under the circumstances[111].

Perhaps the legislator should have previously regulated the criteria to determine the conditions and the manner in which remedies may be sought in all those cases which are not emergencies and where the patient does not require exclusively emergency medical assistance. [112] I would like to point out that a patient may have circumstances or a medical condition of temporary incapacity to take decisions about himself, which do not relate to a medical emergency, and that this may be exclusively a case of the need for appropriate therapy or doctrinal treatment at the time of the patient's treatment or medical care, but not at the time of the provision of emergency medical assistance, where a certain risk of a real and imminent threat to his life is created.

Discussion

Knowing the facts and potential errors when examining medical negligence committed in the delivery of healthcare is essential so that healthcare institutions and healthcare staff can correct any shortcomings and prevent similar mistakes. The prompt handling of such cases is important for the safety of all users of health services[113]. The judicial system must be effective - one that allows the cause of death of patients under the care of a doctor, whether in the public or private sector, and the doctor's potential liability to be established (Šilih v. Slovenia[114]; Powell v.

[111]Medical Service Act (ZZdrS), Article 3, para 1.
[112]ZPacP, Article 2, para. 12.
[113]ECtHR *Lopez de Sousa Fernandes v Portugal*, no. 56080/13, 19.12.2017, para. 218.
[114]ECtHR *Šilih v. Slovenia*, no. 71463/01, 9.4.2009, para. 192.

United Kingdom[115]; Calvelli v. Italia[116]). In order to fulfil this obligation, such procedures must not only exist in theory but must also operate effectively in practice. In other words, the procedure must be completed within a reasonable time. It appears that both national jurisdiction and the provisions of the ECHR and its Protocols do not sufficiently provide for an adequate means of exercising rights and do not specify the necessary criteria for cases which would ensure the maximum possible health security for the complainant in the field of health care during the exercise of the right to justice. The ZPacP does not provide for a method and procedure to ensure that the patient can exercise a change of decision on treatment (change of the consent declaration), and not only a refusal of treatment, which would ensure that the patient or other persons entitled under the law can exercise the protection of human rights and the dignity of the human being[117], and defend the intervention against the consequences and risks to which he or she is exposed in the course of the treatment. The law should allow the patient to modify the (existing) consent declaration in concrete circumstances. At the same time, the law should allow the patient to choose another health care provider that enables him or her to exercise the right to adequate treatment and the right to adequate, high-quality and safe health care.

It follows from the foregoing that the law does not provide for a method and procedure to ensure that the patient is able to implement the change after consenting to the treatment, and not only after refusing it. This would ensure that the patient or the person entitled under the law is able to exercise the protection of human rights and the dignity of the human being and to protect the intervention from the consequences and risks to which the patient is exposed during the course of the treatment. Ultimately, this would allow the patient to refuse or modify his/her declaration of consent and to freely choose another healthcare provider[118] in the network of public health service providers financed by the statutory health insurance. In so doing, he/she shall exercise the right to adequate, high-quality and safe healthcare (right to health) in the manner and according to the procedures laid down by law[119].

The existing regime of the PHC Act does not allow persons who are entitled under the Act to exercise their right to judicial protection against the merits (substance) of a decision of a doctor, which is not regulated by the PHC Act, how the patient or persons entitled under the law (who may consent to a medical intervention or treatment during the patient's temporary incapacity to take decisions for himself or herself) are enabled to defend and protect their legal interests against a meritorious (substantive) decision of a doctor relating to a medical intervention or treatment.

[115]ECtHR *Powell v. The United Kingdom*, no. 45305/99, 21.2.1990, para. 49.
[116]ECtHR *Calvelli in Ciglio v. Italia*, no. 32967/96, 17.1.2002, para. 49.
[117]In accordance with the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: The Convention on Human Rights in Biomedicine.
[118]ZPacP, Article 9, para. 1.
[119]Higher Labour and Social Court, Judgement Psp 225/2022, 3.11.2022, para. 10.

Conclusions

The recent case-law and the Rules of Procedure of the ECtHR do not provide precise principles or explanations leading to the Court's decision on the assessment of pecuniary compensation for non-pecuniary damage awarded to the victim as a result of the interference with a right under Article 41. It is also clear from a review of the case law of the ECtHR that case law in the area of non-pecuniary damage in the context of establishing liability continues to evolve. Courts should take a clear position on the award of monetary damages for just satisfaction to adequately protect the consequences for the injured party when he or she suffers harm as a result of an interference with the constitutionally protected rights of the individual, rights recognised by the ECHR and its Protocols. The instrument of 'just satisfaction', as provided for in the ECHR and developed by the ECtHR, should be used as an important remedy in cases of violation of patients' rights where no other immediate judicial remedy is available; the right to a remedy should also be exercised by the legal system as part of an effective remedy, even while the violation is still ongoing. The mere fact that a patient's fundamental human rights (his private sphere) have been violated by an interference with a right protected by law should, without undue delay, lead the court to mitigate the ongoing violation and its consequences. In the Republic of Slovenia, specific statutory provisions should be adopted, as there is no general law on "just satisfaction" in all cases of human rights violations. The Court of Human Rights should also have the power to provide for a remedy for the violation of a patient's fundamental human rights. This would ensure that the patient is compensated as quickly as possible and that health care institutions have an incentive to respect the patient's rights to the fullest extent. It remains open to debate which violations of patients' rights should be subject to "just satisfaction" and in what procedure to ensure its swift effect.

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Artificial Intelligence: A Twenty First Century International Regulatory Challenge

*By Ori Igwe**

Artificial Intelligence (AI) is a twenty first century evolution. Certain aspects of AI have been integrated into daily living. AI applications have also been incorporated into the aviation, banking, cyber security, educational, employment, health, and military sectors respectively. However, the unpredictable nature of AI is a cause for concern because 'In many instances, AI remains under the control of users and designers, but in increasing numbers of applications, the behaviour of a system cannot be predicted by those involved in design and application […]. Newly developed machines are able to teach themselves and even collect data'. Consequently, 'The potential benefits and harms of AI have led to calls for governments to adapt quickly to the changes AI is already delivering and the potentially transformative changes to come. These include calls to pause AI development and for countries […] to deliver a step-change in regulation'. 'In March 2023, more than 1,000 artificial intelligence experts, researchers and backers signed an open letter calling for an immediate pause on the creation of "giant" AIs for at least six months, so the capabilities and dangers of such systems can be properly studied and mitigated'. What are the benefits of AI? What are the risks of AI? Which crimes can be committed via AI? What are the regulatory challenges? What has been the international response? In this article, we will explore whether there is a justification for regulating AI from ethical, legal and law enforcement perspectives.

Keywords: *Artificial intelligence; Ethics; Regulation; Law enforcement*

Incorporation of AI 1Applications into Various Sectors

This paper investigates the legal challenges to the international regulation of AI. It highlights how AI has been incorporated into daily life and identifies benefits and risks of AI. The origin of AI can be traced to 1950 when Alan Turing commonly known as the founding father of AI introduced a test which gauged the ability of machines to independently copy human actions and answer questions so accurately that it is indistinguishable from humans. He established that computers can implement programmed actions.[1] In 1956 the phrase 'AI' was coined by John McCarthy at a summer conference in Dartmouth college. McCarthy and associates suggested that machines can in principle stimulate every aspect of learning or any other feature of intelligence.[2] From a broad perspective AI can be defined as 'the theory and development of computer systems able to perform tasks normally

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[1]Brynjolfsson (2022).
[2]Moor (2006).

requiring human intelligence such as visual perception, speech recognition, decision-making, and translation between languages'.[3] Artificial intelligence (AI) is developing rapidly and will change our lives by improving several aspects.[4] The applications range from AI applications enhancing online shopping and personalised shopping to AI applications in scientific areas[5]. The progress of AI in many sectors has proven to be effective.[6]

Integration of AI into Daily Living

AI technologies have been integrated into daily life ranging from voice assistants which complete specific tasks to security gadgets which engage in surveillance actions. In the United Kingdom (UK), statistical data provided by the Office for National Statistics in 2023 demonstrates that individuals and businesses utilise one or more AI applications daily albeit in varying proportions[7]. Pool and Bozic argue that the invention of AI has advantageously enhanced the lives of individuals.[8] They highlight that AI has been incorporated into the transport sector, employment sector, war zone and everyday living. Specifically, digital voice assistants have become a staple in many households because they are simple to use and assist with daily tasks by utilising AI applications. They are also beneficial to people living with disabilities.[9]

Examples of digital voice assistants include Alexa, Echo, Echo Dot, Siri, Google Assistant and Cortana. Individuals can instruct the gadgets to complete tasks such: play music, read the news, control electronic devices, check bank balances, and complete other tasks.[10] Via simple instructions, they can also be asked to provide information on the weather, answer general knowledge questions and swich on/off lights.[11] The amalgamation of AI and machine learning enables such gadgets to recognise the voice of humans and complete specific commands. Given their compatibility with washing machines, light bulbs, ovens, air conditioning units and so on, it has been argued that gadgets such as Alexa, Siri, Google Assistant and Bixby are taking control of our homes.[12] Further, companies such as Amazon, Netflix, and Spotify also utilise algorithms to recommend products and offer personalised customers shopping experiences based on

[3]Tobin (2023).
[4]https://digital-strategy.ec.europa.eu/en/consultations/white-paper-artificial-intelligence-european-approach-excellence-and-trust
[5]https://research-and-innovation.ec.europa.eu/research-area/industrial-research-and-innovation/key-enabling-technologies/artificial-intelligence-ai-science_en#:~:text=AI's%20role%20in%20science,the%20reach%20of%20current%20tools
[6]Wubineh, Deriba & Woldeyoannis (2024).
[7]https://www.ons.gov.uk/businessindustryandtrade/itandinternetindustry/articles/understandingaiuptakeandsentimentamongpeopleandbusinessesintheuk/june2023#:~:text=In%202023%2C%2034%25%20of%20UK,study%20(PDF%204.5%20MB)
[8]Poola & Bozic (2017).
[9]Ibid.
[10]Ibid.
[11]Santander (2022).
[12]Ibid.

listening and viewing histories. Suffice it to say that AI assists in various tasks ranging from finding routes to industrial process management.[13] Consequently, Caldwell et al assert that AI has pervaded the twenty first century connected world at numerous levels.[14] However from a critical perspective, the actions of AI are unpredictable because although AI is still under the control of users and designers, in a growing number of applications, those people involved in the design and application cannot predict the behaviour of a system.[15] Therefore, the unpredictable feature of AI is concerning given that data is inputted into a "blackbox" that generates output which may adversely affect the daily lives of several individuals. Additionally, new machines can teach themselves and even collect data.[16]

Benefits and Potential Risks of AI

Aviation Sector

In a bid to improve efficiency, safety, and competitiveness, major organisations have put immense pressure on the aviation sector to adopt artificial intelligence technologies (AI).[17] Consequently, the rapid development and implementation of AI technologies in the aviation sector is significantly transforming the aviation eco system.[18] It is envisaged that the adoption of AI technologies will revolutionise operations and resolve challenges[19]. In particular, AI driven tools such as machine learning, natural language processing are being leveraged in the almost all areas of modern aviation from flight planning to aircraft maintenance.[20] Therefore, Kashyap acknowledges that machine learning plays vital roles ranging from traffic management to the identification of passengers.[21] Likewise, Abubakar et al highlight that employing AI in the aviation industry enhances air traffic management, identification of threats, passenger identification, customer services and training and practices.[22] Importantly, Kirwan asserts that leveraging AI in aviation has numerous advantages such as minimising fuel traffic consumption thereby reducing carbon footprint, helping flight crew members in emergencies to identify solutions and analysing voluminous data.[23] Utilising AI in the aviation industry is increasingly widespread and has equipped the industry to "better predict flight demand, optimise schedules and pricing, analyse aircraft data to predict maintenance needs, optimise slot distribution for landing aircraft,

[13]Caldwell, Andrews, Tanay & Griffin (2020).
[14]ibid
[15]Stahl (2021).
[16]Ibid.
[17]Kabashkin, Misnevs & Zervina (2023).
2. [18]Kashyap (2019).
[19]Ibid.
[20]Yang & Huang (2003).
[21]Kashyap (2019).
[22]Abubakar, Odunlmi, Mangei & Al-Turjman (2022).
[23]Kirwan (2024).

facilitate air traffic management, plan fuel efficient routes, and enhance the passenger experience through AI-powered chatbots and virtual assistants"[24].

From an ethical perspective, there are concerns that the integration of AI into the aviation sector poses several risks. Some concerns are that AI technologies can ignore human instructions and act autonomously leading to unintended outcomes like accidents and fatalities. Additional concerns relate to cyber criminals targeting AI enabled aircrafts, air traffic control systems, AI generated aviation programmes, airports, and in-flight entertainment. Also from a cyber security perspective, vulnerabilities in aviation systems can be exploited by threat actors such as hackers, terrorists and state backed actors. This could happen due to various reasons ranging from modifications (patches) not being applied to commercial software to the spoofing of flight data[25]. Further, cyber criminals can exploit vulnerabilities by hacking into aviation technologies such as weak airport telecommunication systems, air traffic controls, data communication systems, Wi-fi networks, entertainment systems, satellite navigation systems, aeroplane, and airports among others.[26] The effects of such cyber-attacks range from increased passport control security checks to cancellation of flights. Consequently, Ishtiaq and Rahman recommend the implementation of defence techniques ranging from an Incident Response Plan to a set of protocols and procedure.[27]

Bank Sector

Some AI applications have been incorporated into the banking sector which have impacted how customers engage in bank transactions daily. Moreover, studies have shown that in the banking sector, AI has been used in several ways in addition to crediting rating models and predication of bank collapses.[28] Importantly, Farishy conducted a study on the use of AI in the banking sector utilising system literature review and found that AI can enhance the banking business by improving accuracy, decision making procedures and efficiency.[29] Additionally, AI can perform customer service tasks in banks and enhance security checks via the use voice recognition AI tools. Further, chatbots can be used in the banking sector to enhance customer performance, streamline sales thereby increasing profits via precise decision making processes.[30] Further, time consuming jobs can be automated by AI resulting in productivity.[31] AI is beneficial because it can provide insights into the requirements of customers and notify customers of suspected fraud and increase in subscriptions.[32] Further, via leveraging natural language processing and machine learning algorithms, chatbots have assisted banks greatly by providing tailored and conversational experiences

[24]Sadou & Njoya (2023) at 6.
[25]https://www.gao.gov/assets/gao-21-86.pdf
[26]Ishtiaq & Rahman (2021).
[27]Ibid.
[28]Farishy (2023).
[29]Ibid.
[30]Ness & Muhammad (2024).
[31]Khan (2023).
[32]Ibid.

to many user areas.[33] Therefore, Gadhoume highlights various ways in which AI has been successfully integrated into the banking sector ranging from the use of AI to improve customer experience to the use of algorithm trading which enables banks to identify trade patterns, predict trends and undertake profitable trading of stock choices.[34] From an ethical perspective, the use of AI algorithms which are trained on biased datasets can result in discriminatory banking practices which lead to unfair and biased decisions in this sector. Therefore, D'Antonoli reiterates that human biases can be perpetuated by AI algorithms and given their 'blackbox' feature, there is often insufficient transparency in their decision making process.[35] The ability of algorithms to exhibit social biases when considering bank loan applications for example devoid of human input illustrates the risks associated with enabling machines to make such grave decisions.[36]

Cyber Security Sector

There are numerous benefits of integrating AI in the cyber security sector. Some of the benefits include identifying potential threats, preventing fraudulent activities, monitoring network data, responding to potential threats, analysing voluminous network data, predicting threats, identifying vulnerabilities, generating reports, notifying cyber security officials of potential threats, and undertaking difficult time-consuming routine tasks. Specifically, deep learning technologies are AI technologies which can improve cyber security defences and safeguard against a wide selection of cyber threats, including malware, phishing attacks, and insider threats.[37] Importantly, research on the effectiveness of AI-based technologies on organisational cyber security in comparison to traditional cyber security approaches provided key findings.[38]

The research which was based on a systematic literature review of peer reviewed articles from 2013 to 2018 found that AI can have a positive effect on organisational cyber security and can be advantageous in terms of automation, threat intelligence and enhanced cyber defence.[39]

Although AI can enhance the safety of customers and businesses by hindering cyber-crime, from an ethical perspective research has found there are several drawbacks ranging from increased adversarial attacks to issues with implementing AI in organisations such as obsolete technological infrastructure lack of good quality 'error-free & clean data.[40] This is significant given that datasets comprising of high quality data are required to train AI models and avoid the inadequacy of AI.[41] Against this backdrop from a social engineering perspective, a study into the utilisation of multifaceted applications of generative

[33]Gadhoum (2022).
[34]Ibid.
[35]'Antonoli (2020).
[36]Owczarczuk (2023).
[37]Jawaid (2023).
[38]Ibid.
[39]Ibid.
[40]Jada & Mayayise (2024).
[41]Ibid.

AI in social engineering attacks investigated the threat environment. The study which was conducted via the "blog mining technique" found that hackers are utilising generative AI tools such as WormGPT, WolfGPT and FraudGPT to engage in phishing, deepfakes, misinformation, scams, vishing and autonomous industrial scale social engineering attacks.[42] The study emphasised that these cyber security attacks can lead to hacking, data breaches, financial loss, reputational damage and legal implications.[43] Additionally, numerous disadvantages of using AI in cyber security have been identified ranging from adversaries utilising AI for crime to the fact that substantial financial investment/resources are required to integrate AI into the cyber security field.[44] Further, Jawaid reiterates that the challenges of using AI in cyber security range from lack of cyber security professionals with AI expertise to ethical concerns given that AI systems can generate unfair outputs if trained on bias or data.[45] Therefore, vital strategies including promoting trustworthy AI development should be implemented.[46]

Education Sector

The integration of AI into the academic field can have several impacts encompassing education and research. AI can enhance the effectiveness and accuracy of research, improve collection of data and quickly process voluminous data.[47] In terms of AI applications, incorporating various applications like "intelligent tutoring systems, adaptive learning platforms and automated grading tools" can individualise learning, streamline processes and improve accessibility[48]. Further, AI can enhance student engagement, improve student motivation**,** provide individualised learning trajectories[49] and provide individualised student feedback via voice and gesture recognition.[50] Additionally, AI automates boring and lengthy teaching tasks.[51] The utilisation of AI in education has numerous benefits in relation to personalised learning.[52] Significantly, a study which explored the use of artificial intelligence in education found that utilising AI in education created personalised learning pathway like regular access to training in virtual contexts, adaptation of educational content to personal needs of students, real-time and regular feedback, improvements in the education process and mental stimulations. Likewise, Yang and Zhang note that AI robots can promote the acquisition of knowledge and skills devoid of any guidance from teachers.[53] Additionally a

[42]Falade [2023]
[43]Ibid.
[44]https://www.computer.org/publications/tech-news/trends/the-use-of-artificial-intelligence-in-cybersecurity
[45]Jawaid (2023).
[46]Ibid.
[47]Kooli (2023).
[48]Chaushi, Ismaili & Chaushi (2024) at 51.
[49]Ibid.
[50] Ting-Chia, Hsiu-Ling, Gwo-Jen & Mu-Sheng (2023).
[51] Ibid.
[52] Tapalova & Zhiyenbayeva (2022).
[53]Yang & Zhang [2019].

recent study on the pros and cons of Artificial Intelligence in education' found that AI "personalises education, streamlines processes and enhances accessibility with the use of diverse AI applications encompassing intelligent tutoring systems, adaptive learning platforms, and automated grading tools".[54] However from a critical perspective, the recent study conducted by Chaushi et al also found that potential biases and data privacy are ethical challenges of utilising AI in education.[55] Similarly, Kooli emphasises that the use of AI in the academic sector raises ethical challenges in education and research such as perpetuating inherent bias and discrimination, manipulation of AI tools to produce biased results and cheating in assessments.[56] Specifically, Kooli highlights several disadvantages of chatbots specifically ranging from facilitating cheating to a reduction in critical thinking and independent problem solving skills.[57]

Employment Sector

The integration of AI into the job sector is expected to lead to a reduction in arduous lengthy tasks which can be performed autonomously and speedily by AI and to AI performing dangerous jobs. It is also envisaged that AI will create jobs, perform tasks speedier and more efficiently in addition to boosting economic growth and labour productivity via the creation of new jobs and faster working.[58] Although it has been suggested that AI can displace certain jobs, act as a cheaper substitute for employees and perform jobs previously completed by employees, it has nevertheless been acknowledged that the technology can also increase the demand for employees through the creation of new AI related industries for example.[59] Importantly, Liang stresses that AI has changed jobs thereby requiring people to obtain new skills and jointly work efficiently with AI systems. Moreover, Liang argues that AI has created new jobs in areas ranging from AI engineering to AI regulation.[60] Likewise, Bian asserts that via reinstatement in AI related industries, new tasks and jobs may be created thereby increasing labor demand.[61] Similarly, Daniel suggests that AI could create new jobs in machine learning engineering, data science and AI ethics in addition to transforming current jobs which will entail undertaking tasks requiring creativity, critical thinking, emotional intelligence, lifelong learning and upskilling.[62]

From a critical perspective, there are concerns that the integration of AI and automation into the employment sector will lead to shortage of skills, skills gap, replacement of humans with robots, job loss and revaluation of jobs. Some of the concerns relate to potential job displacements, substitution of jobs, and changes of job structure.[63] Liang emphasises that the integration of AI into industries has had

[54]Chaushi, Ismaili & Chaushi (2024) at 51.
[55]Chaushi, Ismaili & Chaushi (2024).
[56]Kooli (2023).
[57]Kooli (2023).
[58]Du (2024).
[59]Bian (2024).
[60]Du (2024).
[61]Bian (2024).
[62]Daniel (2023).
[63]Du (2024).

an outstanding effect on employment by enabling the automation of routine and repetitious tasks thereby leading to displacements specifically in the manufacturing sector.[64] Additional potential challenges identified include ethical concerns, lack of comprehensive policies, the threat of AI completing jobs previously held by people and job loss.[65] Sharif et al note that certain AI applications such as automation which are utilised specifically in the e-commerce sector complete predictive analysis tasks speedier than humans. As a result, they argue that certain jobs such as cashiers are being replaced with automated checkout scanners which could lead to job instability if AI completely takes over countless jobs.[66] Likewise, Bian asserts that language models have a significant effect on the employment market and that the displacement effect, productivity effect and reinstatement effect of AI cause instability in the labour market. Hence, Bian suggests that policies should be introduced by authorities to regulate AI.[67]

Health Sector

AI will be increasingly implemented in health care because of the convolution and increase in data in this sector.[68] AI can be deployed for the following: diagnosing illness, analysis of voluminous digital health data, drug development, research, monitoring health, delivering personalised care, performing surgery, and measuring body parts.[69] The various benefits of leveraging AI applications in healthcare range from enhanced patient experience to reduction of mistakes in diagnosis and mistakes.[70] Crucially, medical robots can be used in surgical operations, rehabilitation, social interaction and assisted living.[71] Furthermore, AI assisted robots can perform the task of analysing data "from pre-operative medical records to physically guide a surgeon's instrument in real time during a procedure".[72] The automation of lengthy repetitive tasks via AI can save time thereby enabling health and social care professionals time "to care".[73] Remarkably, algorithms are already exceeding radiologists in spotting malignant tumours and helping researchers in the construction of groups for clinical trials.[74] For example on 27 June 2023, it was announced in the UK, that an AI machine learning technology named 'Osairis' had been developed by and for the National Health Service (NHS) at Addenbooke's hospital for treating cancers and analysing scans. Significantly, it was reported that 'Osairis' which is the first AI technology to be

[64]Liang (2024).
[65]Sharif, Gurbuz & Ay (2023).
[66]Ibid.
[67]Bian (2024).
[68]Davenport & Kalakota (2019).
[69]Naik, Zeeshan, Shetty, Swain, Shah, Paul Aggarwal, Ibrahim, Patil, Smriti, Shetty, Rai, Chlosta, & Somani (2022).
[70]Chen & Decary (2019).
[71]Ibid.
[72]Chen & Decary (2019) at 12.
[73]https://digital-transformation.hee.nhs.uk/building-a-digital-workforce/dart-ed/horizon-scanning/ai-and-digital-healthcare-technologies/introduction/the-impact-of-ai#:~:text=AI%20will%20impact%20the%20health,easily%20be%20automated%204%2C%205
[74]Davenport & Kalakota (2019).

developed and deployed within the NHS had been vital in decreasing waiting time for cancer patients thereby curtailing doctors' time in preparing scans.[75] A study which was conducted in 2024 by Wubineh, Deriba and Woldeyohannis on the opportunities and challenges of implementing artificial intelligence in healthcare was insightful.[76] The study which analysed 33 published articles between 2015 to 2022 found that leveraging AI leads to several benefits inclusive of "teamwork and decision-making, technological advancement, diagnosis and patient monitoring, drug development, and virtual health assistance".[77] Despite the various beneficial uses of AI in the health sector as discussed above, the use of AI in health care poses challenges regarding who controls the data that is used for AI systems and privacy issues. Additional challenges range from ascertaining who controls the data used by AI systems to the lack of explainability (the black box) of algorithms.[78]

Military Sector

AI can be leveraged in the military sector to mount defence and attack measures in response to malware, virus, hacking, phishing, spyware, and other cyber-attacks. Essentially, AI assists in analysing historical data, identifying potential threats and establishing response capabilities in this period of constant cyber threats thereby enabling organisations to manage vulnerabilities, identify vectors, monitor patterns, and implement safety measures. Furthermore, AI plays a vital role in analysing military intelligence in addition to planning and supporting military operations.[79] Critically, AI can enhance the operation of autonomous systems such as unmanned vehicles, increase the abilities of robots to navigate unmanned platforms and enhance the ability to identify and categorise threats.[80] From a defence perspective, the application of AI in the military sector such as machine learning has improved safety practice, identification of targets, threat assessments, security protection, data processing, gathering of intelligence, battlefield decisions and accurate military guidance.[81] In particular, network security is enhanced because cyber-attacks can be identified and defined by leveraging machine learning models to analyse network traffic, identify abnormal patterns and promptly respond to detected risks.[82] Also, drones can be used for military wars and ChatGPT can be used to make data driven decisions. From a transportation perspective, the utilisation of autonomous vehicles and Unmanned Aerial Vehicles (UAVs) have become increasingly widespread in the military sector. Further, AI can be used for facial recognition, identification of enemies and

[75]https://www.cuh.nhs.uk/news/ai-cuts-waiting-times-for-cancer-patients-in-nhs-first/
[76]Wubineh, Deriba,& Woldeyohannis (2024).
[77]Ibid.
[78]https://digital-transformation.hee.nhs.uk/building-a-digital-workforce/dart-ed/horizon-scanning/ai-and-digital-healthcare-technologies/introduction/the-impact-of-ai#:~:text=AI%20will%20impact%20the%20health,easily%20be%20automated%204%2C%205
[79]Szabadfoldi (2021).
[80]Ibid.
[81]Li (2024).
[82]Ibid.

the monitoring of targets. Fundamentally, AI can also be used in conflict, intelligence gathering and defence.

Despite the benefits highlighted above, the use of automated tools like robots and drones have raised safety concerns. There are also concerns that cyber criminals like terrorists and hackers can exploit AI systems to engage in robotic assassinations, activate mobile robotic explosive devices and hijack lethal autonomous weapons. These fears are compounded by the fact that there is a lack of human judgement in the leveraging of AI autonomous technologies. Against this backdrop, a report which explored the military applications of AI and its utilisation in war and peace, found that a major opposition was the potential of people being killed by machines with the consent of human operators. [83] Additional issues which were identified were 'decision support systems' which make decisions that choose controversial targets without commanders being able to analyse the complicated assessments for such decisions, facial recognition systems leading to the killing or detaining of citizens and intricate AI predictions misrepresenting them as terrorists or criminals.[84] Li therefore asserts that AI technologies are "potentially disruptive" in the military stage leading to a requirement to set up and support a framework dependent on trust and cooperation between nations.[85] Li argues that the international community is consequently required to establish and follow relevant regulations and guidelines to avoid technological development resulting in unfair competitive advantage.

Ethical and Legal Considerations

The invention, development, and integration of AI into various sectors has raised ethical and legal concerns because AI systems can cause various potential harms ranging from bias and discrimination to unreliable, unsafe, or poor-quality outcomes.[86] As a result, society is dealing with legal and ethical issues emanating from AI encompassing privacy and surveillance, bias or discrimination. Potentially, the philosophical challenge faced is the role of human judgment.[87]

From a legal perspective, concerns have been raised because AI technologies or robots which make decisions leading to accidental deaths cannot be held criminally liable. For example, erroneous decision made by self-driving cars, automated planes, drones and medical robots leading to accidents or fatalities. In such situations, questions of accountability, liability and responsibility arise because it is debatable if the manufacturer, programmer, operator, human controller, and or retailer should be blamed. Although AI has transformed the banking industry in several ways as discussed above there are numerous ethical risks. The risks include data privacy concerns, bias and unfair outcomes, cyber

[83]Morgan, Boudreaux, Lohn & Ashby (2020).
[84]Ibid.
[85]Li (2024) at 316.
[86]Ibid.
[87]Naik, Zeeshan, Shetty, Swain, Shah, Paul, Aggarwal, Ibrahim, Patil, Amriti, Shetty, Rai, Chlosta & Somani (2022).

security concerns, transparency concerns, conflicts with financial institution policies and governance framework due lack of transparency in AI models.[88] In relation to bias, AI systems can generate unfair or inequitable outputs if they are trained on data which is biased or discriminatory.

From a cyber security perspective, data privacy, effects on the ability of humans to make decisions and the prospect of adversaries engaging in cyberattacks constitute serious ethical concerns.[89] Given the ethical challenges which emanate from leveraging AI in the cyber security sector, there is an urgent requirement for "responsible AI practices, transparency and human oversight" to tackle risks and ensure that technologies within the cyber security sector are used ethically.[90] Essentially, AI models need to be constantly monitored in the future, updated and modified to changing cyber threats.[91]

From an educational perspective, the utilisation of AI in education can lead to ethical challenges in relation to data privacy and potential bias.[92] In particular, the utilisation of AI and chatbots in research poses ethical challenges in relation to data collection, use and dissemination in addition to the likelihood of misuse and exploitation.[93] The ethical issue of discrimination can result in biased machine learning algorithms making unfair recommendations for marginalised groups. Further, personal data of young students may be breached if they cannot provide consent.[94]

From an employment perspective, AI can unjustly affect decisions based on factors such as race, gender, sexual orientation and age when hiring or sacking employees. Specifically, the use of AI algorithms which are trained on biased datasets can result in discriminatory employment practices which lead to unfair and biased decisions in these sectors. Therefore, D'Antoni emphasises that inequalities can exits or be reinforced when AI algorithms which are trained on data that inherit biases or include under-represented population characteristics.[95] Further, the impact of leveraging AI and robotics in the employment sector and the prospect of AI systems attaining or surpassing human-equivalent capabilities have raised ethical concerns.[96]

From a healthcare perspective**,** the utilisation of AI in clinical practice raises the specific ethical issues of informed consent to use data, safety and transparency, algorithmic fairness and biases, and data privacy.[97] Davenport asserts that the use of AI in healthcare raises the following varied ethical implications: accountability,

[88]https://www.openaccessgovernment.org/ai-in-the-financial-industry-machine-learning-in-banking
[89]Ali (2024).
[90]Ali (2024) at 80.
[91]Ibid.
[92]Chaushi, Ismaili & Chaushi (2024).
[93]Kooli (2023).
[94]Ibid.
[95]Ibid.
[96]https://www.europarl.europa.eu/RegData/etudes/STUD/2020/634452/EPRS_STU(2020)634452_EN.pdf
[97]Naik, Zeeshan, Shetty, Swain, Shah, Paul, Aggarwal, Ibrahim, Patil, Amriti, Shetty, Rai, Chlosta & Somani (2022).

transparency, permission, and privacy.[98] Importantly, a recent study which was conducted by Wubineh, Deriba and Woldeyohannis on the opportunities and challenges of implementing AI in health care found that in addition to providing several benefits, using AI in the health sector impedes multifaceted difficulties, encompassing 'ethical and privacy-related issues, lack of awareness, unreliability of technology, and professional liability'.[99]

Similarly, from a military perspective, Li highlights that the extensive use of machine learning has led to issues with personal privacy and data security.[100] Furthermore, machine learning models can generate unfair and unjust outcomes if they are trained on data which are inherently biased.[101] Moreover, autonomous technology operated via machine learning such as drones which search for, identify hidden targets and hit enemy targets can make erroneous judgments or choose to ignore human instructions thereby leading to unintended fatalities. Such errors raise the issues of accountability for crimes committed and transparency. The concern is justifiable given that autonomous robotic vehicles, and autonomous robots otherwise referred to as 'killer robots' sometimes act without control.[102] There is also the added issue of innocent people being wrongly identified as targets by facial recognition. Against this background, Morgan et al conducted a study which investigated the military application of AI and explored the ethical effects of utilising them in war and peace. The study found that participants identified several ethical risks ranging from accountability and moral responsibility to human rights and privacy.[103] Therefore, Ali stresses the need to develop AI tools that 'augment human capabilities, provide explainable insights, and enable effective collaboration between human experts and algorithms.[104]

Crimes Committed by Artificial Intelligence

AI can play a growing role in the commission of criminal acts given that the digital nature of AI enables it to be used legitimately and for crimes.[105] King et al conducted a study on foreseeable threats posed by AI crimes. Crucially the study revealed that AI can be used for committing crimes ranging from sexual offences to theft.[106] Further, a study conducted by Caldwell, Andrews & Griffin, on AI-enabled future crimes highlighted eighteen categories of threats ranging from Audio/Video impersonation to forgery.[107] Although the study acknowledged that AI can be advantageous to individuals and organisations, it revealed that AI can also be used to commit offences such as blackmail via the use of fake videos, theft,

[98]Davenport & Kalakota (2019).
[99]Wubineh, Deriba & Woldeyohannis (2024) at 1.
[100]Li (2024).
[101]Ibid.
[102]Morgan, Boudreaux, Lohn & Ashby (2020).
[103]Ibid.
[104]Ali (2024) at 83.
[105]King, Aggarwal, Taddeo & Floridi (2019).
[106]Ibid.
[107]Caldwell, Andrews & Griffin (2020).

extortion, intimidation, and terror.[108] Crucially, the study identified several means via which AI can assist criminals ranging from deepfakes to tailored phishing.[109] Consequently, from a criminal perspective, Dupuont et al suggest that three imminent consequences regarding the risks created by AI are the expansion of existing threats, creation of entirely new threats and modification of the nature of threats.[110] Additionally, Brundage et al identify potential scenarios for the malicious use of AI and make various policy recommendations which include the requirement for a multilateral cooperation.[111]

Specifically, criminals can use AI to engage in criminal activities such as fraud, hacking, phishing, vishing, stalking, sexual offences, terrorist offences, intellectual property offences and smuggling of drugs and offensive weapons via unmanned cars. From a global perspective, the ability of criminals to leverage AI for crimes is concerning because they can commit crimes via AI automation such as using drones, lethal autonomous weapons, and self-driving cars to commit murder globally. Hence Stahl stresses that autonomous weapons which can decide who and when to attack are available by extension to terrorists in addition to governments.[112] Against this background, Falade carried out a study into how several applications of Generative AI are leveraged in social engineering attacks using the technique of blog mining method to obtain data on social engineering attacks involving generative AI.[113] The research explored how cybercriminals can engage in cyber-attacks using ChatGPT, FraudGPT and WormGPT AI models. Significantly, the study found that the types of social engineering attacks generated by AI are phishing, pretexting, scams and deepfakes. In particular, the research revealed that such attacks can lead to various offences ranging from disinformation to cyber security challenges.[114] Pivotally, the study established that threat actors engage in such offences by crafting tailored phishing emails, crafting undetectable malwares, creating deepfake videos and virtual identities, creating deepfake websites, engaging in voice cloning and vishing attacks, using AI phishing tools, using automation for cyber-attacks and relying on the adaptive learning abilities of AI.[115]

[108]Ibid.
[109]Ibid.
[110]https://www.researchgate.net/publication/337402608_Artificial_Intelligence_in_the_Context_of_Crime_and_Criminal_Justice/link/5dd57d34299bf11ec866c413/download?_tp=eyJjb250ZXh0Ijp7ImZpcnN0UGFnZSI6InB1YmxpY2F0aW9uIiwicGFnZSI6InB1YmxpY2F0aW9uIn19
[111]https://www.researchgate.net/publication/323302750_The_Malicious_Use_of_Artificial_Intelligence_Forecasting_Prevention_and_Mitigation/link/5a942764aca2721405668800/download?_tp=eyJjb250ZXh0Ijp7ImZpcnN0UGFnZSI6InB1YmxpY2F0aW9uIiwicGFnZSI6InB1YmxpY2F0aW9uIn19
[112]Stahl (2021).
[113]Falade (2023).
[114]Ibid.
[115]Ibid.

Regulation

There are numerous ethical and legal concerns about leveraging AI technologies in different sectors such as algorithmic bias, accountability, privacy, transparency, explainability and job loss. There is also a growing fear that humanity faces existential risks because AI technologies can reason, understand, learn and utilise their own intelligence to solve problems. Against this background, Mclean et al stress that Artificial General Intelligence (AGI) which is the forthcoming generation of AI, is anticipated to exceed human intelligence in every way.[116] There is currently no international unified AI strategy.[117] Thus, there have been calls for the regulation of AI to ensure that it is designed ethically, responsibly and safely. Particularly, Chavali, Baburajan, Kumar & Chandana Katari argue that the creation of a strong regulatory system is required to combat the ethical, legal and societal issues which emanate from using AI.[118] They suggest that this is vital to engineer the trustworthy development and deployment of AI tools.

From a legal perspective, the challenge of accountability has been raised in the healthcare sector. Importantly, D'Antonoli questions who will be accountable for an unintended result if an error is made by an AI system given that it is not certain if is the user, the auditor, or the producer of the algorithm will be deemed responsible.[119] Similarly, Kirwan highlights that the application of AI in the aviation industry produces adverse results and leads to safety issues.[120] Further, AI may lead to no one being held accountable for any damage done given that the extent of danger is unascertained and utilisation of machines will restrict the ability of people to find someone at fault and responsible for the decision making.[121] From a safety perspective, the conundrum of who is to blame when pilots act on their own judgements instead of AI tools or follows unsafe advice from AI technologies resulting in accidents and fatalities is an ethical issue.[122] Additionally, the militarisation of AI has very serious implications for global security and warfare.[123] Against the above background, governments will have to decide to hold either designers of AI or their owners and users liable.[124]

From a cyber security perspective, because the integration of AI into the cyber security sector specifically has raised several ethical issues, it has been suggested that a balance ought to be struck between utilising the strength of AI for cybersecurity and instituting strong regulatory measures to ensure responsible and ethical use.[125] From an employment perspective, on 17 July 2023, Hollywood

[116]Mclean, Read, Thompson, Baber, Stanton & Salmon (2023).
[117]Panait, Lubenkov & Alic (2021).
[118]Chavali, Baburajan, Kumar & Chandana katari (2024).
[119]D'Antonoli (2020).
[120]Kirwan (2024).
[121]Naik, Zeeshan, Shetty, Swain, Shah, Paul, Aggarwal, Ibrahim, Patil, Amriti, Shetty, Rai, Chlosta & Somani (2022).
[122]Kirwan (2024).
[123]https://unu.edu/article/militarization-ai-has-severe-implications-global-security-and-warfare
[124]Khalaileh (2023).
[125]Ali (2024).

stars went on a strike in front of NETFLIX and Disney headquarters.[126] Two main reasons for the strike were the advent of AI in the acting industry and the financial impact of streaming services on staff payments. Similarly on 21 July 2023, UK actors and actresses held a London rally in Leicester Square in support of the US actors and actresses.[127] There have also been recent renewed calls for AI to be regulated. For example, on 14 June 2024 during the recent G7 summit in southern Italy, Pope Francis urged G7 leaders to ban the use of autonomous weapons.[128] He asserted that such weapons should not be empowered to decide who will live or die. He requested for an AI treaty to ensure that AI is developed ethically and morally.

UK's Repones to the Regulation of AI

In 2021, the UK government published a National AI Strategy which is a 10-year plan to make the UK a "global AI superpower" by focusing on three specific aims ranging from investing and planning to ensuring that the UK is on board with the national and international governance of AI technologies.[129] On 29 March 2023, the government published a White Paper titled 'Pro-Innovation Approach to AI Regulation' which highlighted that regulators should apply five principles in regulating AI ranging from safety, security and robustness to contestability and redress.[130] The UK government confirmed that it intends to encourage regulators to use powers and resources available to them in implementing the cross sectoral principles to govern the safe and innovative use of AI.[131] Significantly on 1 and 2 November 2023, UK hosted the first global AI Safety Summit at Bletchely Park which discuss safety measures for addressing risks from AI. Importantly, the global summit was attended by representatives from 28 nations, including the US, EU, and China which endorsed the Bletchley Declaration.[132] The declaration is a committed agreement to support a globally inclusive network of scientific research on advanced AI safety and promote the advantageous use of technology for the good of all. [133]

[126]Sankaran (2023).
[127]https://www.theguardian.com/culture/2023/jul/21/uk-star-london-rally-support-striking-us-actor-brian-cox-equity-union
[128]https://www.theguardian.com/world/article/2024/jun/14/pope-tells-g7-leaders-ai-can-be-a-both-terrifying-and-fascinating-tool#:~:text=Pope%20Francis%20has%20made%20a,of%20autonomous%20weapons%20in%20war
[129]https://researchbriefings.files.parliament.uk/documents/CDP-2023-0152/CDP-2023-0152.pdf
[130]Department for Science, Innovation and Technology (2023a).
[131]ibid
[132]Department for Science, Innovation and Technology (2023b).
[133]https://data.parliament.uk/DepositedPapers/Files/DEP2024-0504/Annex_A_-_Call_for_Views_on_the_Cyber_Security_of_AI__1_.pdf

Australia, Canada, China and US's Responses to the Regulation of AI

Australia

On 24 January 2024, the Australian Government Productivity Commission published a research paper on the challenges of regulating AI.[134] The paper identified four essential steps for regulating AI. The first step is establishing how the technology is currently being used or probably to be used in the imminent future. The second step is determining if the use of the technology leads to heightened risks of serious harm in comparison to the counterfactual. The third step is ascertaining the people who can influence risks and outcomes. The fourth step is to establish if the risk is being tackled by existing regulation or if legislation ought to be extended or amended.[135] It is anticipated that in addition to formal regulation, industry self-regulation will contribute to the regulation of AI in Australia.

Canada

In comparison to Australia, Canda is expected to regulate AI via the Artificial Intelligence and Data Act (AIDA).[136] Importantly, the Act will define the basis for the responsible design, development and deployment of AI which affect the lives of Canadians. The AIDA was established as part of the Digital Charter Implementation Act 2022.[137] Significantly, in September 2023, a Voluntary Code of Conduct was publicised by Canadian government. The code highlights general standards for companies and enables companies to prove that their companies are developing AI technologies trustworthily prior to the enactment of formal regulation.[138]

China

In China, attempts have been made to introduce regulatory measures. For example, in 2017, the Peoples Republic of China state council approved the *New Generation Artificial Intelligence Development Plan.* [139]The plan is significant because it highlights the development of AI as a priority and discusses the national AI strategy with a view to model China as the global leader in AI by 20230.[140] Additionally, in September 2022 Shanghai enacted a law to regulate the development of the AI industry which arguably promotes the innovative AI development in by the industry sector.[141] Further in September 2022, the Shenzhen regulation was passed which supports Chinese governmental

[134]https://www.pc.gov.au/research/completed/making-the-most-of-the-ai-opportunity/ai-paper2-regulating.pdf
[135]ibid
[136]Hereinafter - Artificial Intelligence and Data Act.
[137]Ibid.
[138]https://ised-isde.canada.ca/site/ised/en/voluntary-code-conduct-responsible-development-and-management-advanced-generative-ai-systems
[139]Filipova (2024).
[140]Ibid.
[141]https://www.sidley.com/-/media/resource-pages/ai-monitor/laws-and-regulations/20220922-shanghai-regulations-on-promoting-the-development-of-artificial-intelligence-industry.pdf?la=en

organisations to lead AI implementation and development.[142] Moreover via the Personal Information Protection Law[143], Cyber Security law[144] and the Data Security Law[145], specific aspects of designing and using AI have been regulated.

USA

In the US, boosting leadership in AI is an uppermost prime concern which is promoted by the Biden Administration. [146] Consequently in 2019, a senate taskforce on AI was set up which has since passed 15 bills into law that prioritises research and risk assessment. Additionally, in January 2021, the Artificial Intelligence Initiative Office was established by the White House Office of Science and Technology Policy. Further, on 23 October 2023, President Joe Biden signed an Executive Order "to advance efforts across the federal government, building on previous actions to harness the benefits and mitigate the risks of AI". The Executive Order is expected to promote the Safe, Secure and Trustworthy Development and Use of Artificial Intelligence.[147] On 28 March 2024, it was reported that the Biden Administration issued 3 new policies.[148] The policies were introduced in response to increasing concerns ranging from risks created by AI in the US workforce sector to potential discrimination in decision-making.[149] Additionally, on 28 March 2024 a memorandum which identified new agency requirements and guidance for AI governance, innovation, and risk management was signed for the heads of executive departments and agencies.[150]

European Union's Repones to the Regulation of AI

The European Union (EU) has taken several steps to regulate AI between 2018 and 2024 specifically. In 2018, the European commission published a European strategy aimed at tackling issues and maximising benefits offered by AI. The strategy has a three-pronged approach to 'boost the EU's technological and industrial capacity and AI uptake across the economy, prepare for socio-economic changes, and ensure an appropriate ethical and legal framework'.[151] Additionally in 2018, the European AI Alliance was set up by the European Commission in 2018 to start a conversation on AI. The alliance which promotes trustworthy AI by sharing best practices among the members and helping developers of AI and other

[142]Filipova (2024).
[143]https://digichina.stanford.edu/work/translation-personal-information-protection-law-of-the-peoples-republic-of-china-effective-nov-1-2021/
[144]ibid
[145]https://digichina.stanford.edu/work/translation-data-security-law-of-the-peoples-republic-of-china/
[146]Panait, Lubenkov & Alic (2021).
[147]https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence
[148] https://eu.usatoday.com/story/news/politics/2024/03/28/biden-unveils-new-policies-for-use-of-ai-by-federal-government/73122365007/
[149]ibid
[150]https://www.whitehouse.gov/wp-content/uploads/2024/03/M-24-10-Advancing-Governance-Innovation-and-Risk-Management-for-Agency-Use-of-Artificial-Intelligence.pdf
[151]https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0168

stakeholders to apply vital requirements has engaged approximately 6000 stakeholders via regular events, public consultations, and online forum exchanges. The 4th AI Alliance Assembly was held in Madrid n 16 and 17 November 2023, and focused on policy aspects that are leading trustworthy AI globally.[152] Further in 2018, the European Commission appointed the High-Level Expert Group on Artificial Intelligence (AI HLEG) to advise on the implementation of a European Artificial Intelligence Strategy. Importantly, a report on the Ethics Guidelines for Trustworthy AI was produced by the group which identified 7 crucial requirements, which every AI technology should meet before it is deemed safe and trustworthy.[153] The requirements range from human agency and oversight to accountability.

In response to the calls for the regulation of AI, the EU commission put forward the Artificial Intelligence Act (AIA) in a bid to balance the AI development by the police against the safeguarding of fundamental human rights and societal values.[154] The Act is revolutionary because it highlights that accountability and transparency are important pillars in democratic societies.[155] On 13 March 2024, the AIA was adopted by the European commission. The Act is the first global legal framework for AI. The AIA sets out a cross-sectoral regulatory approach to the use of AI systems across the European Union (EU) and its Single Market. The legal framework incorporates a risk-based approach which promotes the regulation of AI applications which are considered high risk. The AIA identifies a four- tiered risk approach which acknowledges the different categories of risks created by AI to health, Safety and/or fundamental human rights. The levels of risks are unacceptable, high, limited and minimal.[156] The four categories of risks protect "fundamental rights, consumer rights and safety"[157]. Further, the AIA sets out proportionate requirements and obligations per risk level. However, critics have argued that the Act is problematic. Specifically, Vainionpää, Väyrynen, Lanamäki and Bhandari conducted a study on the challenges and criticisms of the European Artificial Intelligence Act. The study was based on a "disciplined -agnostic systematic literature review that captured all relevant peer reviewed English-language research on the AIA"[158]. Crucially, the study identified the following problems regarding the AIA:

1. Premise and approach of the AIA
2. Scope of the AIA
3. Formation and wording of the AIA
4. Requirements of the AIA
5. Compatibility and alignment with the existing regulatory landscape

[152]https://digital-strategy.ec.europa.eu/en/events/4th-european-ai-alliance-assembly-leading-trustworthy-ai-globally>
[153]https://www.aepd.es/sites/default/files/2019-12/ai-ethics-guidelines.pdf
[154]AIA – hereinafter Artificial Intelligence Act. https://www.policechiefmagazine.org/policing-ai-driven-world-europol/
[155]ibid
[156]https://www.europarl.europa.eu/topics/en/article/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence
[157]Penait, Lubenkov & Alic (2021) at 30.
[158]Vainionpää, Väyrynen, Lanamäki & Bhandari (2023) at 3.

6. Compliance with and enforcement of the AIA
7. Expected impact of the AIA

Against the above background, it was highlighted that: "The complexity and potential risks of AI make it essential to establish regulatory frameworks to ensure responsible and ethical development and use of AI aligned with societal values"[159].

Additionally, the EU has implemented the General Data Protection Regulation which governs the processing and free movement of personal data.[160] The regulation constitutes a legal guide on data protection and privacy when utilising AI. It provides instructions on the processing of personal data and the free movement of such data with a view to safeguarding privacy.

Due to a lack of global regulation of AI, several independent initiatives have been launched internationally.[161] Consequently, in March 2021 specifically, the European parliament published a study which revealed twenty one international initiatives that had been initiated by the following countries, Germany, United Kingdom, United States, Japan, The Netherlands, Belgium Finland, Europe, Canada, and Switzerland.[162] The study was pivotal because it provided useful information on initiatives, locations, key issues tackled, publications and sources of funding. Additionally, the study revealed numerous ethical harms tackled by the various international initiatives. Specifically, the study identified key issues which emerged from the initiatives and categorised them into twelve. The twelve categories range from human rights and well-being to existential risk. Importantly, five out of the twelve categories are regularly discussed in academic literature. The categories are Accountability and responsibility; Security, privacy, accessibility, and transparency; Safety and trust; Lawfulness and justice; and Control and the ethical use-or misuse-of AI.

Ethical, Legal and Law Enforcement Justifications for Regulating AI

From an ethical perspective, the design, manufacturing, programming, implementation, and utilisation of AI technologies should be regulated to ensure the fair, safe, trustworthy, and transparent use of AI for the common good. Regulating AI will promote the safe, responsible, trustworthy use and design of technologies.

From a legal standpoint, regulatory measures will provide a legal basis for prosecutors to hold people accountable for crimes and mistakes that are engaged in via leveraging or instructing AI. In effect, the introduction and implementation of regulatory measures will mitigate risks ranging from bias to lack of accountability. Significantly, the issue of establishing who should be held accountable and culpable for mistakes made by AI can be resolved via either the enactment of robust laws or the implementation of existing adequate laws given that there is an

[159]Vainionpää, Väyrynen, Lanamäki & Bhandari (2023) at 1.
[160]https://commission.europa.eu/law/law-topic/data-protection/data-protection-eu_en
[161]https://www.europarl.europa.eu/RegData/etudes/STUD/2020/634452/EPRS_STU(2020)634452_EN.pdf
[162]Ibid.

ongoing debate on whether AI should be recognised as having 'legal personhood' or 'legal autonomy'.[163]

From a law enforcement perspective, the regulation of AI will promote safety, security, governance contestability and the seeking of redress. Crucially, the regulation of AI will enable law enforcement officials such as police officers to hold people accountable and investigate AI generated cyber-crimes, such as fraud, misinformation, terrorism, intellectual property offense and manslaughter. Additionally, when mistakes are made by AI technologies or inherent flaws lead to unintended outcomes, culprits will be hindered from evading criminal or tortious liability by arguing that they did not anticipate that AI would engage or not engage in an act.[164] To this effect, from a military perspective, it has been highlighted that the development of AI technologies such as 'autonomous weapons, drone technologies, robotic assassinations and mobile-robotic improvised explosive devices' ought to be scrutinised.[165] Moreover, it has been emphasised that the immediate need for regulation is demonstrated by the following additional concerns: privacy violation, algorithmic bias, employment displacement.[166] It is anticipated that the various justifications for regulating AI will ensure that such technologies are designed and deployed for the common good.

Challenges to the Regulation of AI and Justifications for regulation

Although ethical and legal concerns posed by AI technologies have led to calls for regulation, several challenges could impede the regulation of AI. This is more so because there are various actors, implications of AI, technical terminologies and evolving applications.

Definition of AI

There is no globally agreed definition of AI. Consequently, any possible global progress on this is impeded because countries are "oblivious of the scope of commitment shall always be rooted to the absence of clear definition of the subject matter"[167]. There is also a wide range of definitions which changes with the passage of time.[168] An additional dilemma is ascertaining if AI should be defined from a broad perspective which promotes a flexible interpretation or a narrow perspective which offers a specific interpretation.

Cross Jurisdictional Feature of AI

Given the borderless feature of AI, variations can exist in definitions adopted by several governments because there is no consensus on a global definition of AI.

[163]Stahl (2021).
[164]Ibid.
[165]Ibid.
[166]Chavali, Baburajan, Kumar & Chandana Katari (2024).
[167]Khalaileh (2023) at 23.
[168]Schuett (2019).

Moreover, the lack of a clear agreement on the legal definition can lead to ambiguity if different governments adopt varied definitions. Further, the effects of AI in regions will be different thereby requiring the creation of distinct regulations. Consequently, Walter asserts that although the borderless feature of AI requires international cooperation, this may not be possible due to various cultural, ethical and legal standards that exist in several nations.[169]Against this backdrop, Shuett suggests that the legal definition. of AI should contain the following requirements: inclusiveness, precision, comprehensiveness, practicability and permeance.[170]

The Rapid Advancement of AI and Lack of Legal Expertise

The swift advancement and evolution of AI poses another challenge because it necessitates constant regulatory changes to ensure that AI regulations are up to date. The speedy development of AI tools frequently outpaces the rate at which legislation can be developed and enforced.[171] To this effect, it has been highlighted that "the largely unpredictable and dynamic nature" of AI are factors which constitute problems with regulating such technologies in addition to the "traditional approach to legislation which is reactionary and too slow to be adopted or amended"[172]. The rapid evolution of AI is a huge obstacle which hinders prompt introduction of regulatory measures which can match the pace of AI development. Crucially, Walter acknowledges that there is an inconsistency between technological advancements and the capacity of regulatory structures in protecting democratic values and human rights particularly.[173] Walter writes from a perspective which suggests that there are socioeconomic consequences which can emanate from creating a global policy and promoting governance in AI regulation.

Another regulatory challenge is the lack of legal expertise required to draft adequate laws which are sufficiently detailed and fulfil the legal certainty fundamental law requirement.[174] This challenge is compounded by the technological intricacies, complexities and non-transparent features of AI. Collectively, the numerous challenges discussed above are worsened by the fact that there is an onus on regulators to arguably balance the need to promote innovation against the adequate regulation of AI.

Conclusion

The integration of AI into the aviation, banking, cyber security, education, employment, health, and military sectors respectively has several benefits and potential risks. The continuous advancement of AI necessitates the urgent requirement for regulation to tackle ethical and legal concerns. From a law

[169]Walter (2024).
[170]Schuett (2019).
[171]Walter (2024).
[172]Owczarczuk (2023) at 300.
[173]Walter (2024).
[174]Kaal (2016).

enforcement perspective, given that many criminals can target victims globally via AI, robust legislative measures need to be introduced at national and international levels to address such deviant acts. In regulating AI, a balance should be struck between integrating the strengths of AI into various sectors and implementing effective regulatory measures to ensure the responsible and ethical use of AI. Regulations should evolve as AI advances to ensure that the measures are up to date. This is imperative given the fears over AI becoming conscious, cleverer than humans and leading to the extinction of humans. Given the constant advancement of AI, it is vital that regulatory measures cover current and anticipated individual and societal implications to avoid being obsolete or inadequate. Regulators should perform a balancing exercise between innovation and mitigation of risks in a bid to promote enforcement and compliance.

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Unlocking Access: How Gauteng Province's Online Admission System is upholding the Right to Basic Education in South Africa: A Human Rights Perspective

By Tshilidzi Knowles Khangala[*]

Access to basic education is a fundamental human entitlement enshrined within the framework of the Constitution of South Africa, playing a crucial role in promoting societal equity and national progress. In the dynamic context of Gauteng Province, characterised by rapid urbanisation, demographic diversity, and socio-economic disparities, achieving this constitutional mandate faces significant challenges. This research meticulously examines the implementation and consequences of the online admission system, designed to enhance access to basic education in Gauteng. The study delves into the constitutional framework of education rights and the socio-economic context of Gauteng Province, stressing the importance of innovative solutions like the online admission system to address educational disparities. It scrutinises the legal basis of education rights and the functioning of the online admission system, with a focus on legislative frameworks such as the South African Schools Act. The research extensively examines the implementation and impact of the online admission system in Gauteng, highlighting its role in enhancing access to preferred schools and rectifying historical inequalities. It also assesses challenges like the digital divide and administrative complexities, proposing strategies to enhance fairness and inclusivity in education delivery. Lastly, the study examines the impact of Gauteng's online admission system on educational access, using empirical evidence to assess outcomes and implications. By offering a detailed analysis spanning legal, socio-economic, and practical aspects, the research contributes to discussions on education rights and policy implementation in South Africa. Overall, it suggests that the online admission system has significant potential to advance societal equity and human development.

Keywords: *Access; Basic Education; Gauteng Province; Human Rights; Online Admission System*

Introduction

Access to basic education is not only a fundamental human right but also a cornerstone of societal development and progress. Enshrined within the Constitution of South Africa, 1996, the right to education serves as a beacon of

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hope for ensuring equitable opportunities for all citizens, regardless of their socio-economic background or demographic characteristics.[1] In the dynamic context of Gauteng Province, characterised by rapid urbanisation, cultural diversity, and socio-economic disparities, the realisation of this constitutional right poses significant challenges. However, innovative mechanisms such as the online admission system have emerged as potential tools to overcome these challenges and enhance access to basic education for all residents of Gauteng.

The constitutional right to education, as articulated in Section 29 of the Constitution of South Africa, establishes the legal framework for ensuring access to quality education for all citizens[2]. Within Gauteng Province, this right takes on added significance given the complex interplay of factors such as urbanisation, migration, and socio-economic disparities. Addressing these challenges requires innovative approaches that prioritise fairness, transparency, and inclusivity in the education system.[3] Amidst the evolving landscape of education provision, the online admission system has emerged as a transformative tool for enhancing access to basic education in Gauteng Province. This system allows parents and guardians to apply for school admissions electronically, thereby streamlining administrative processes, promoting transparency, and empowering families to make informed choices about their children's education. By leveraging technology, the online admission system has the potential to overcome traditional barriers to access and address longstanding inequalities in school admissions.[4]

This study seeks to undertake a detailed examination of the online admission system within the broader context of realising the constitutional right of access to basic education in Gauteng Province. Specifically, the objectives of this analysis include: exploring the legal foundations and policy frameworks that underpin education rights and the implementation of the online admission system in Gauteng; examining the socio-economic factors that shape access to education in Gauteng, including urbanisation, demographic diversity, and socio-economic disparities; identifying and analysing the challenges and opportunities associated with the online admission system, including issues of digital divide, administrative complexity, and parental empowerment; and evaluating the outcomes and impact of the online admission system on access to basic education in Gauteng, including enrolment rates, parental satisfaction, and administrative efficiency. By examining the legal, socio-economic, and practical dimensions of the online admission system as a tool for realising the constitutional right of access to basic education in Gauteng Province, the study aims to contribute to the broader discourse on education rights and policy implementation in South Africa, with implications for promoting social justice and human development.

[1]Marishane (2017).
[2]Section 29 of the Constitution.
[3]Parker, Hamann & de Kadt (2021).
[4]https://www.timeshighereducation.com/hub/p/learning-south-africa-opportunity-online-learning

Literature Review

In the context of South Africa, it is important to recognise the extensive body of literature on the right of access to basic education. However, a significant portion of this literature tends to provide a broad and general perspective. Notably, these discussions often lack a specific focus on the Online Admission System in the Gauteng Province. Additionally, there is a considerable gap in considering the potential impact of international and African instruments and treaties on the right of access to basic education in South Africa.

Methodology

This study uses a qualitative research approach to evaluate the impact of the Gauteng Province's Online Admission System on the right of access to basic education in South Africa. This is done through the examination of legal texts, legal periodicals, scholarly literature, online resources, significant statutes, and court rulings. International and African instruments and treaties are also sources for this study. Additionally, the Constitution of the Republic of South Africa, 1996, as the supreme law of the country, will be a key primary source.

The Legal Framework

The Constitution of the Republic of South Africa, 1966[5]

The right of access to education is universally recognised as a fundamental human right essential for personal development, societal progress, and the realisation of other human rights. In South Africa, this right holds significant importance and is enshrined in the Constitution as a cornerstone of social justice and national development.[6]

Section 29 of the Constitution explicitly guarantees the right to education. It affirms that everyone has the right to a basic education, including adult basic education. Furthermore, the Constitution imposes an obligation on the state to progressively make this right accessible and available to all citizens.[7] This provision underscores the government's responsibility to not only ensure access to education but also to uphold standards of quality and equity in educational provision. The constitutional guarantee of the right to education serves as a foundational principle guiding education policy and practice in South Africa. It affirms the importance of education as a fundamental human right and emphasises the state's duty to prioritise and allocate resources towards its realisation. Moreover, the Constitution places an obligation on the government to adopt measures aimed at continuously improving the quality and accessibility of

[5]Hereinafter - the Constitution.
[6]Marishane (2017).
[7]Section 29 of the Constitution.

education, thereby reflecting a commitment to lifelong learning and the holistic development of individuals.[8]

Several landmark cases have shaped the interpretation and application of the right to education in South Africa. These cases have elucidated the legal principles and obligations inherent in the constitutional guarantee of the right to education. Two notable cases are discussed below:

The first is *Minister of Education v. Harris*[9], in which the Constitutional Court addressed disparities in education funding and resources among schools, particularly those serving historically disadvantaged communities. The Court affirmed that such disparities perpetuate inequality and undermine the right to education. This case underscored the state's obligation to take affirmative action to address resource inequalities and ensure equitable access to quality education for all learners. The case originated from a legal challenge brought by the governing body of Rivonia Primary School, located in a historically disadvantaged area, against the Gauteng Department of Education (GDE). The governing body argued that the school was severely under-resourced compared to schools in more affluent areas, resulting in inferior educational outcomes for its learners. The case raised fundamental questions about the state's obligation to address resource inequalities in education and ensure equitable access to quality education for all learners.

At the heart of the case were questions about the interpretation and application of the right to education guaranteed under Section 29 of the Constitution of South Africa. The key legal issues included: Whether disparities in education funding and resources among schools violated the constitutional principles of equality and non-discrimination; and the extent of the state's obligation to address resource inequalities and ensure equitable access to education, particularly for learners from historically disadvantaged backgrounds. The Constitutional Court, in its ruling, affirmed that disparities in education funding and resources among schools constituted unfair discrimination and violated the right to education guaranteed under the Constitution. The Court emphasised that education is a fundamental human right essential for the realisation of other rights and the promotion of social justice and equality. The Court held that the state had an obligation to take affirmative action to address resource inequalities and ensure equitable access to quality education for all learners. The Court's decision highlighted the need for targeted interventions to redress historical inequalities and promote educational equity. It underscored the state's duty to prioritise the allocation of resources to schools serving historically disadvantaged communities and to adopt measures aimed at levelling the playing field in education provision.

This case had significant implications for education policy and practice in South Africa. It set a precedent for addressing resource inequalities in education and affirmed the state's duty to ensure equitable access to quality education for all learners. The case underscored the importance of targeted interventions and affirmative action measures to promote educational equity and redress historical injustices. Following the Court's decision, the government implemented various

[8]Mestry (2017).
[9][2001] ZACC 25; 2001 (4) SA 1297 (CC); 2001 (11) BCLR 1157 (CC).

initiatives aimed at improving the distribution of education funding and resources, particularly to schools in historically disadvantaged areas. These initiatives included increased funding for infrastructure development, teacher training programs, and support services for schools serving marginalised communities. Moreover, the case served as a catalyst for broader discussions about educational transformation and social justice in South Africa. It highlighted the intersectionality of education with other socio-economic rights and underscored the importance of education as a tool for advancing equality and promoting inclusive development.

The other case is of *Governing Body of the Juma Musjid Primary School v. Essay N.O. and Others*.[10] In this case, the court addressed the principles of fairness and transparency in school admission policies in South Africa. The case originated from a legal dispute between the governing body of Juma Musjid Primary School, a public school in Johannesburg, and the GDE. The dispute centred on the school's admission policies, particularly its practice of prioritising the admission of children of the Muslim faith over non-Muslim children. The case raised fundamental questions about the constitutionality of preferential admission criteria based on religion and the principles of fairness and equality in school admissions. The key legal issues in the case included: Whether the school's admission policy, which prioritised children of the Muslim faith, infringed upon the constitutional right to freedom of religion and discriminated against non-Muslim children; and whether the school's admission policy violated the principles of fairness and equality enshrined in the Constitution, particularly in the context of public education provision.

The Constitutional Court, in its ruling, held that the school's admission policy was unconstitutional as it infringed upon the principles of fairness and equality. The Court emphasised the importance of transparent and non-discriminatory admission procedures in public schools, particularly in the context of ensuring equal access to education for all learners. The Court held that while public schools are entitled to adopt admission criteria based on legitimate educational objectives, such criteria must be applied in a manner that is consistent with constitutional principles of fairness and equality. The Court further emphasised the state's duty to regulate admission policies to ensure that they adhere to constitutional standards and promote inclusivity and diversity in education provision.

This case reaffirmed the principles of fairness, transparency, and equality in school admissions and underscored the state's role in regulating admission policies to ensure compliance with constitutional principles. Following the Court's decision, the government implemented measures to strengthen oversight and regulation of school admission policies, particularly in relation to criteria based on religion or other protected characteristics. The case also prompted broader discussions about the role of public schools in promoting inclusivity and diversity and the need to balance the autonomy of governing bodies with the state's duty to uphold constitutional rights.

By affirming the state's duty to regulate admission policies to ensure compliance with constitutional principles of fairness and equality, the case

[10][2011] ZACC 13; 2011 (8) BCLR 761 (CC).

underscored the importance of promoting inclusivity and diversity in education provision. The case served as a reminder of the constitutional imperatives that govern public education and highlighted the ongoing need for vigilance in safeguarding the rights of all learners in South Africa.

The South African Schools Act (SASA)[11]

The SASA is a pivotal piece of legislation that governs education provision across South Africa, including in Gauteng Province. SASA plays a significant role in safeguarding and promoting the right of access to education by establishing a comprehensive legal framework that ensures equitable access, fair governance, and quality education for all learners.

Section 3 of the SASA mandates compulsory education for all children between the ages of 7 and 15, ensuring that access to basic education is universal and mandatory.[12] Section 5 of the SASA emphasises the importance of equitable access to education, prohibiting unfair discrimination in admission policies and requiring provincial education departments to ensure that schools do not exclude or discriminate against learners based on race, gender, religion, or socio-economic status.[13] SASA empowers school governing bodies to develop admission policies that ensure fair and transparent admission procedures, without unfairly discriminating against any learner. Section 16 of SASA provides for the establishment of school governing bodies, which play a crucial role in the governance and management of schools, including decision-making on admission policies and resource allocation.[14] SASA outlines procedures for the allocation of resources, including funding, infrastructure, and personnel, to schools in Gauteng Province, aiming to ensure equitable access to resources among all schools. Moreover, it requires Provincial Education Departments to develop norms and standards for school infrastructure, ensuring that schools in Gauteng have adequate facilities to support teaching and learning.[15]

The case of *Head of Department, Mpumalanga Department of Education and Another v. Hoërskool Ermelo and Another*[16] is a significant legal precedent in South African jurisprudence, addressing the state's obligation to provide adequate school infrastructure. The case arose from a legal dispute between the Mpumalanga Department of Education and Hoërskool Ermelo, a public school in Mpumalanga Province. The dispute centred on the inadequate infrastructure at the school, particularly the lack of adequate classrooms and sanitation facilities. The case raised fundamental questions about the state's duty to provide basic school infrastructure and the implications of its failure to do so for learners' right to education.

[11]South African Schools Act 84 of 1996.
[12]Section 3 of the South African Schools Act 84 of 1996.
[13]Section 5 of the South African Schools Act 84 of 1996.
[14]Section 16 of the South African Schools Act 84 of 1996.
[15]Section 29 of the South African Schools Act 84 of 1996.
[16][2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC).

The central legal issues in the case included, whether the state's failure to provide basic school infrastructure violated learners' constitutional right to a basic education; and the extent of the state's obligation to ensure adequate school infrastructure and the implications of its failure to fulfil this obligation for learners' rights. In its ruling, the Constitutional Court held that the state's failure to provide basic school infrastructure, including adequate classrooms and sanitation facilities, violated learners' right to a basic education. The Court emphasised that access to education is not limited to the provision of educational content but encompasses the provision of a conducive learning environment that includes adequate infrastructure. The Court held that the state had a duty to take reasonable measures to address the deficiencies in school infrastructure and ensure that learners had access to safe and conducive learning environments.

The Court's decision underscored the state's obligation to prioritise the allocation of resources to address infrastructure deficiencies in schools, particularly those serving historically disadvantaged communities. It emphasised the importance of adequate school infrastructure in promoting educational quality and ensuring that learners can effectively access and benefit from educational opportunities. This case had significant implications for education policy and practice in South Africa. It highlighted the importance of adequate school infrastructure in safeguarding learners' right to education and promoting educational quality. Following the Court's decision, the government implemented measures to address infrastructure deficiencies in schools, particularly in historically disadvantaged areas. These measures included increased investment in school infrastructure development, prioritisation of infrastructure projects, and improved monitoring of infrastructure provision.

Moreover, the case underscored the state's duty to ensure that educational resources are allocated equitably among schools to address historical inequalities and promote educational equity. It served as a reminder of the state's constitutional obligations to prioritise the interests of learners and ensure that they have access to the resources necessary for their educational development. In essence, SASA plays a crucial role in safeguarding and promoting the right of access to education in Gauteng Province. Through its provisions on equitable access, fair governance, and resource allocation, SASA establishes a comprehensive legal framework that ensures all learners have equal opportunities to access quality education. Furthermore, relevant case law highlights the importance of SASA in promoting fair and transparent admission processes, adequate infrastructure development, and equitable resource allocation in schools. By upholding the principles of fairness, equality, and inclusivity, SASA contributes to the realisation of the constitutional right to education for all learners in Gauteng Province.

The National Education Policy Act (NEPA)[17]

The NEPA is a cornerstone of South Africa's education system, providing the legal framework for the development and implementation of education policies at

[17]National Education Policy Act 27 of 1996.

the national level. NEPA has a significant impact on the right of access to education in South Africa, ensuring that all learners have equal opportunities to quality education. NEPA empowers the Minister of Basic Education to develop and promulgate national education policies that guide education provision across South Africa. Section 3 of NEPA outlines the objectives of education policy development, emphasising the promotion of equal access to quality education, the improvement of educational outcomes, and the provision of support to learners and educators.[18]

The case of *Minister of Education and Others v. Pillay*[19] highlighted the importance of NEPA in guiding education policy development. The Constitutional Court emphasised the state's obligation to ensure that education policies are formulated in line with constitutional principles of equality and non-discrimination. This case underscored NEPA's role in promoting policies that advance access to education for all learners, irrespective of their background or circumstances. The case originated from a legal challenge brought by the governing bodies of several public schools in KwaZulu-Natal against the Department of Education. The dispute centred on the Department's language policy, which required the use of English as the primary language of instruction in public schools, with limited provision for instruction in indigenous languages. The case raised fundamental questions about the balance between language rights and the quality of education, particularly for learners from non-English-speaking backgrounds.

The central legal issues in the case included, whether the Department's language policy infringed upon learners' constitutional right to receive education in the language of their choice, as guaranteed under section 29(2) of the Constitution; and whether the use of English as the primary language of instruction adversely affected the quality of education for learners from non-English-speaking backgrounds, thus violating their right to education. In its ruling, the Constitutional Court held that the Department's language policy infringed upon learners' constitutional right to receive education in the language of their choice.[20] The Court emphasised that language is an essential aspect of cultural identity and plays a crucial role in effective teaching and learning. The Court further held that the Department had a duty to adopt language policies that promote multilingualism and accommodate the diverse linguistic needs of learners.

The Court's decision underscored the importance of respecting language rights in education and ensuring that language policies do not undermine the quality of education for learners from non-English-speaking backgrounds. The Court held that while English may be used as a medium of instruction, learners should have the option to receive education in their mother tongue or another language of their choice, particularly during the early years of schooling. This case had significant implications for education policy and practice in South Africa. It highlighted the importance of language rights in education and underscored the state's obligation to adopt language policies that promote multilingualism and

[18]Section 3 of the National Education Policy Act 27 of 1996.
[19][2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC).
[20]Section 29(2) of the Constitution of the Republic of South Africa,1996.

accommodate the diverse linguistic needs of learners. Following the Court's decision, the government implemented measures to revise language policies in public schools, with a greater emphasis on promoting the use of indigenous languages and providing support for learners from non-English-speaking backgrounds. Moreover, the case served as a catalyst for broader discussions about the quality of education and the need to address disparities in educational outcomes among learners from different linguistic backgrounds. It underscored the importance of promoting inclusive education practices that respect learners' cultural and linguistic identities and ensure equal access to quality education for all learners in South Africa.

Furthermore, NEPA provides the legal framework for the regulation and monitoring of education provision, ensuring compliance with national education policies and standards. Section 6 of NEPA authorises the Minister of Basic Education to issue regulations and guidelines to supplement the provisions of the Act and promote effective education provision.[21]

The case of *Minister of Education and Others v. Governing Body, Rivonia Primary School* [22] highlighted NEPA's role in regulating education provision to promote access to education. The Constitutional Court emphasised the state's duty to ensure equitable access to education resources and held that disparities in education funding and resources violated learners' right to education. This case underscored NEPA's mandate to regulate education provision to ensure equal access to quality education for all learners. The case stemmed from a dispute between the governing body of Rivonia Primary School, located in a historically disadvantaged area, and the GDE. The governing body argued that the school suffered from severe under-resourcing compared to schools in more affluent areas, leading to inferior educational outcomes for its learners. The case raised fundamental questions about the state's duty to address resource inequalities and ensure equitable access to education for all learners.

The central legal issues in the case included: Whether disparities in education funding and resources among schools violated learners' constitutional right to a basic education, as guaranteed under section 29(1)(a) of the Constitution; and the extent of the state's obligation to address resource inequalities and ensure equitable access to education resources, particularly for schools serving historically disadvantaged communities. In its ruling, the Constitutional Court affirmed that disparities in education funding and resources constituted unfair discrimination and contravened the right to education guaranteed under the Constitution. The Court emphasised that education is a fundamental human right essential for the realisation of other rights and the promotion of social justice and equality. Consequently, the state had a duty to take affirmative action to address resource inequalities and ensure equitable access to quality education for all learners.

The Court's decision underscored the imperative of prioritising the allocation of resources to schools serving historically disadvantaged communities. It emphasised the need for targeted interventions to redress historical inequalities and promote educational equity. Furthermore, the decision highlighted the state's

[21]Section 6 of the National Education Policy Act 27 of 1996.
[22][2013] ZACC 34; 2013 (6) SA 582 (CC); 2013 (12) BCLR 1365 (CC).

obligation to adopt measures aimed at levelling the playing field in education provision and ensuring that all learners have access to the resources necessary for their educational development. This case further underscored the importance of addressing resource inequalities in education and ensuring equitable access to quality education for all learners. Following the Court's decision, the government implemented various initiatives aimed at improving the distribution of education funding and resources, particularly to schools in historically disadvantaged areas. These initiatives included increased funding for infrastructure development, teacher training programs, and support services for schools serving marginalised communities. Moreover, the case served as a catalyst for broader discussions about educational transformation and social justice in South Africa. It highlighted the intersectionality of education with other socio-economic rights and underscored the importance of education as a tool for advancing equality and promoting inclusive development.

Additionally, NEPA emphasises the importance of promoting inclusive education that accommodates the diverse needs of all learners, including those with disabilities and special needs. Section 5 of NEPA mandates the development and implementation of policies and programs to support learners with special needs and ensure their access to quality education.[23] The Act's provisions align with constitutional principles of equality and non-discrimination, which have been upheld in various court cases addressing learners' rights to education.[24] Therefore, NEPA plays a pivotal role in promoting the right of access to education in South Africa. Through its provisions on education policy development, regulation of education provision, and promotion of inclusive education, NEPA ensures that all learners have equal opportunities to quality education.

The Gauteng School Education Act (GSEA)[25]

The GSEA is a critical piece of legislation that governs education provision in Gauteng Province. The GSEA plays a pivotal role in shaping the educational landscape and ensuring the realisation of the right of access to education for all learners in the province. The GSEA provides the legal framework for the governance and management of schools in Gauteng Province.

The GSEA provides guidelines for the development and implementation of the curriculum in schools, ensuring alignment with national education policies. Section 10 of the GSEA empowers the provincial education department to establish assessment policies and procedures to ensure the quality and integrity of assessment practices in schools.[26] The Act's provisions contribute to ensuring the quality and relevance of education provision in Gauteng Province, thereby enhancing learners' access to quality education. The GSEA outlines provisions for the allocation of resources, including funding, infrastructure, and personnel, to schools in Gauteng Province. Section 15 of the GSEA mandates the provincial

[23]Section 5 of the National Education Policy Act 27 of 1996.
[24]Section 9 of the Constitution of the Republic of South Africa,1996.
[25]Gauteng School Education Act 6 of 1995.
[26]Section 10 of the Gauteng School Education Act 6 of 1995.

education department to develop norms and standards for school infrastructure, ensuring that schools have adequate facilities to support teaching and learning. the Act's provisions contribute to ensuring that schools in Gauteng Province have access to adequate infrastructure and resources, thereby enhancing learners' access to quality education.[27]

The GSEA plays a crucial role in ensuring the realisation of the right of access to education in Gauteng Province. Through its provisions on governance and management of schools, curriculum and assessment, and school infrastructure and resources, the GSEA establishes a legal framework that promotes equitable access to quality education for all learners in the province. While specific case law directly related to the GSEA may be limited, the Act's overarching objectives and provisions contribute to fostering an enabling environment for education provision that prioritises the rights and needs of all learners in Gauteng Province.

Gauteng Department of Education Admission Regulations - GDE

The GDE has significantly contributed to complementing the existing legislative framework concerning the right to access basic education and learner admission. Through the issuance of regulations and guidelines, tailored to address the specific challenges and intricacies within the province, the GDE has provided practical tools to facilitate the effective implementation and adherence to constitutional principles.

Among the noteworthy regulations established by the GDE is the Gauteng School Admissions Regulations.[28] These regulations offer intricate guidance on the procedures and criteria governing learner admissions. They delineate the steps that both schools and education authorities must follow to ensure transparent and equitable admission processes. Key aspects addressed in these regulations include catchment areas, preferences for siblings, and feeder zone policies, all aimed at fostering fairness and preventing discriminatory practices in admissions.[29]

Moreover, the GDE has issued detailed guidelines pertaining to various facets of the admissions process, including the utilisation of the Online Admission System (OAS). The OAS stands as a cornerstone of the province's initiatives to modernise and streamline admissions. The guidelines provide comprehensive instructions to schools and parents on navigating the OAS effectively, thereby enabling all stakeholders to leverage the system for facilitating admissions seamlessly.

In addition to admissions regulations and guidelines, the GDE has developed policies and protocols targeted at mitigating specific challenges encountered by learners, such as those with disabilities or hailing from disadvantaged

[27]Section 15 of the Gauteng School Education Act 6 of 1995.
[28]GN 4138 of 13 July 2001: Regulations relating to the admission of learners to public schools (Provincial Gazette No. 129); and Notice 1160 of 2012: Regulations for admissions of learners to Public Schools, 2012.
[29]Sections 2, 3, 4 ,5, 6 and 14 of GN 4138 of 13 July 2001: Regulations relating to the admission of learners to public schools (Provincial Gazette No. 129).

backgrounds. These policies are designed to ensure that all learners, irrespective of their circumstances, have equal access to quality education and receive the necessary support to thrive academically.

Overall, the issuance of regulations and guidelines by the GDE underscores its proactive stance toward enhancing the right to access basic education and learner admission in the province. By furnishing clear and comprehensive guidance, the GDE empowers schools, parents, and education authorities to uphold constitutional principles and foster equitable access to education for all learners in Gauteng.

Finally, it is argued that the legislative framework outlined above has a significant impact on access to basic education in Gauteng Province in several ways: By prohibiting unfair discrimination and mandating transparent admission procedures, the legislative framework ensures that all learners in Gauteng have equal opportunities to access education, regardless of their background or circumstances. The legislative framework also ensures that resources are allocated fairly among schools in Gauteng Province, helping to address disparities in infrastructure, staffing, and learning materials that could otherwise hinder access to quality education. Through the NEPA and provincial regulations, the legislative framework guides the development and implementation of education policies that address the specific needs and challenges faced by learners and schools in Gauteng Province.

International Law Perspective

The right to access basic education for children is enshrined in several international instruments and treaties, as well as regional instruments specific to Africa. These instruments provide a comprehensive framework for ensuring that children have access to quality education without discrimination.

Universal Declaration of Human Rights (UDHR)[30]

The UDHR, a pivotal document adopted by the United Nations General Assembly, stands as a cornerstone in articulating the inherent rights belonging to all individuals, irrespective of their race, colour, religion, sex, language, political affiliation, national or social origin, property, birth, or other status. Article 26 serves as a notable provision that explicitly acknowledges the right to education. It unequivocally asserts that: "Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit".[31]

This article underscores the paramount significance of education as a fundamental human right and underscores the imperative for states to ensure its

[30]Universal Declaration of Human Rights (UDHR) of 1948.
[31]Article 26 of the UDHR.

accessibility to all individuals without discrimination. It acknowledges education as an indispensable catalyst for the complete realisation of human potential and underscores its pivotal role in fostering societal advancement and enhancing standards of living. In legal contexts, while the UDHR itself does not carry the force of law as a treaty, its principles have wielded substantial influence over domestic legislation, policies, and court judgments worldwide. Even when not directly applicable within domestic legal systems, courts have frequently turned to the provisions of the UDHR, including Article 26 concerning the right to education, to inform their rulings.

In the landmark case of *Brown v. Board of Education*[32] in the United States, the Supreme Court invoked principles of equality and non-discrimination enshrined in the UDHR to strike down racial segregation in public schools as unconstitutional. The Court underscored that education is not merely a privilege but a fundamental right, and the provision of separate educational facilities for different racial groups inherently perpetuated inequality. Similarly, in the case of *Minister of Education v. Harris* in South Africa, the Constitutional Court drew upon the tenets of the UDHR, including Article 26, to affirm the right to education as a fundamental human right safeguarded under the South African Constitution. The Court underscored the indispensable role of education in the realisation of other human rights and in driving societal progress.[33]

Therefore, while the UDHR's provisions lack direct legal bindingness, their profound influence in shaping legal and societal perceptions regarding education as a fundamental human right cannot be overstated. Courts globally have invoked the principles of the UDHR, particularly Article 26, to underscore the critical importance of education and advocate for equitable access to quality education for all individuals.

Convention on the Rights of the Child (UNCRC)[34]

The UNCRC stands as a seminal international treaty adopted by the United Nations General Assembly in 1989. It delineates an array of rights encompassing civil, political, economic, social, health, and cultural domains specifically tailored for individuals under the age of eighteen, defining them as children. Regarded as the most extensively ratified human rights treaty globally, the UNCRC enjoys near-universal adoption among nations.

Article 28 of the UNCRC serves as a focal point, enunciating the entitlement of children to education. It delineates: "States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all; (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of

[32]347 U.S. 483 (1954).
[33]2001 (4) SA 1297 (CC); 2001 (11) BCLR 1157 (CC).
[34]Convention on the Rights of the Child (UNCRC), 1989.

need; (c) Make higher education accessible to all on the basis of capacity by every appropriate means; (d) Make educational and vocational information and guidance available and accessible to all children; (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates".[35]

These provision underscores the unwavering commitment of states to ensure that education is not only accessible but compulsory and free for all children. It underscores the indispensability of not only primary education but also secondary, higher education, and vocational training in fostering the holistic development and empowerment of children. In the case of *Government of the Republic of South Africa & others v. Grootboom & others*[36] in South Africa, the Constitutional Court grappled with the issue of access to shelter as an inherent right for children. The Court unequivocally affirmed that access to shelter is indeed a fundamental right for children, mandating the government to adopt reasonable measures to guarantee its realisation. It emphasised education's pivotal role in nurturing the complete development and potential of children, while underscoring the government's duty to ensure that all children, irrespective of their socio-economic background or circumstances, enjoy equitable access to shelter opportunities.

This case serves as a poignant exemplar of the judiciary's pivotal role in upholding and enforcing the rights enshrined in international treaties like the UNCRC. It underscores the imperative of unfettered access to shelter as a fundamental human right for children and accentuates the government's obligation to proactively craft measures to actualise this right for all children, sans discrimination, including access to education.

International Covenant on Economic, Social and Cultural Rights (ICESCR)[37]

The ICESCR, established by the United Nations General Assembly in 1966, stands as a cornerstone in the protection of human rights globally. Its comprehensive framework addresses a wide array of economic, social, and cultural rights aimed at fostering human dignity and well-being.

Article 13 of the ICESCR specifically delineates the right to education. It outlines a multifaceted vision wherein education serves as a vehicle for the full development of human personality, dignity, and the reinforcement of human rights and fundamental freedoms.[38] Moreover, education is seen as a catalyst for effective participation in society, fostering understanding, tolerance, and peace among diverse groups and nations. The Covenant further delineates specific measures aimed at realising the right to education in its entirety. These include compulsory and free primary education, the accessibility of secondary and higher education, encouragement of fundamental education for those who have not completed primary education, and the development of an extensive school system with improved conditions for teaching staff.[39]

[35]Article 28 of the UNCRC.
[36]2001 (1) SA 46 (CC). (4 October 2000).
[37]International Covenant on Economic, Social and Cultural Rights, 1966.
[38]Article 13(1) of the ICESCR.
[39]Article 13(2) of the ICESCR.

The case of *Unni Krishnan v. State of Andhra Pradesh* in India stands as a pivotal moment in affirming the fundamental right to education. In this case, the Supreme Court grappled with the interpretation of Article 21 of the Indian Constitution, which enshrines the right to life and personal liberty. The Court unequivocally asserted that the right to education is an intrinsic component of Article 21, encompassing access to basic education for all individuals.[40] This landmark ruling underscored education's pivotal role in nurturing individual potential and emphasised the state's obligation to ensure universal access to education.

The Unni Krishnan case exemplifies the judiciary's crucial role in upholding constitutional and treaty-based rights, particularly in the realm of education. It underscores the imperative of providing equitable access to education, aligning with the principles enshrined in international treaties such as the ICESCR. Ultimately, this case serves as a poignant reminder of education's profound significance as a fundamental human right, deserving of protection and realisation for all individuals.

The African Regional Law Perspective

African Charter on the Rights and Welfare of the Child (ACRWC)[41]

The ACRWC stands as a pivotal regional human rights treaty, officially adopted by the African Union in 1990. Its primary aim is to safeguard and enhance the rights and well-being of children across the African continent. Article 11 of the ACRWC is particularly significant, as it explicitly acknowledges the entitlement of children to education while underlining the necessity of removing barriers that hinder access to education. This provision articulates: "Every child shall have the right to an education, and States Parties shall take all appropriate measures to ensure that the right is progressively realised, and to this end shall, in particular: (a) make primary education compulsory and available free to all; (b) encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need; (c) make higher education accessible to all on the basis of capacity by every appropriate means; (d) ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Charter; (e) encourage regular attendance at schools and the reduction of drop-out rates".[42] This provision echoes the sentiments expressed in Article 28 of the UNCRC, emphasising the imperative of ensuring educational access for all children, irrespective of their socio-economic backgrounds or other circumstances.

[40]1993 AIR 217, 1993 SCR (1) 594, 1993 SCC (1) 645, JT 1993 (1) 474, 1993 SCALE (1)290.
[41]**A**frican Charter on the Rights and Welfare of the Child (ACRWC), 1990.
[42]Article 11 of the ACRWC.

In the precedent-setting case of *SERAC & Another v. Nigeria*[43] before the African Commission on Human and Peoples' Rights, the Commission adjudicated on the Nigerian government's failure to adequately provide basic education, particularly in the Niger Delta region. The Commission unequivocally ruled that such neglect violated Article 11 of the ACRWC, which safeguards the right to education. The ruling underscored the government's obligation to ensure that all children have access to quality education without discrimination.

It is apparent that the ACRWC plays a pivotal role in safeguarding and advancing the rights of children in Africa, including their right to education. Through its provisions and jurisprudence, the ACRWC serves as a potent instrument for advocating children's rights and holding governments accountable for fulfilling their obligations in this domain.

African Charter on Human and Peoples' Rights (ACHPR)[44]

The ACHPR stands as a seminal document in the realm of human rights, originating from the Organization of African Unity (OAU) in 1981, later transformed into the African Union (AU). It delineates a comprehensive array of rights encompassing civil, political, economic, social, and cultural domains for individuals and communities across the African continent. Article 17 of the ACHPR occupies a pivotal position, acknowledging the right to education and underscoring the importance of unfettered access to free and compulsory education. This provision articulates: "Every individual shall have the right to education. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups; and shall further the activities of the African Union".[45] Furthermore, Article 17 accentuates the imperative of dismantling impediments to educational accessibility, thus accentuating the pivotal role of education in nurturing social cohesion and advancing the cause of human rights.

The landmark case of *SERAP v. Nigeria*[46] brought before the ECOWAS Community Court of Justice illustrates the application of Article 17 of the ACHPR. In this case, the court scrutinised Nigeria's failure to furnish free and mandatory basic education, as mandated by the ACHPR. The Socio-Economic Rights and Accountability Project (SERAP) initiated the case, contending that Nigeria's deficient provision of basic education infringed upon the rights of its populace. The ECOWAS Court of Justice ruled decisively in favour of SERAP, unequivocally affirming that Nigeria's lapse in ensuring free and compulsory basic education contravened Article 17 of the ACHPR. The court underscored the pivotal role of education as an indispensable human right and underscored

[43][2001] ACHPR 35.
[44]African Charter on Human and Peoples' Rights (ACHPR), 1981.
[45]Article 17 of the ACHPR.
[46][2012] ECOWASCJ 51.

Nigeria's obligation to furnish accessible, cost-free, and mandatory education to its citizens. This legal precedent epitomises the profound impact of regional human rights mechanisms, such as the ECOWAS Court of Justice, in holding states accountable for upholding their commitments under international human rights instruments like the ACHPR. It reaffirms the intrinsic value of education as a fundamental right and underscores the duty of states to guarantee equitable access to quality education for all individuals, devoid of any form of discrimination.

The Online Admission System (OAS) of the GDE

The GDE Online Admission System (OAS) was introduced in 2015.The implementation of the OAS in Gauteng Province signifies a pivotal advancement in the education sector, with the primary aim of modernising and refining the school admissions process.[47] Historically, the admissions process in Gauteng, akin to other regions, relied heavily on manual, paper-based methods, leading to administrative inefficiencies, long queues, and potential errors in processing applications. Moreover, the traditional process lacked transparency and accessibility, particularly for parents from disadvantaged backgrounds. Recognising these challenges, education authorities in Gauteng embarked on the development and implementation of the OAS as a digital solution to modernise and enhance the admissions process. The OAS sought to leverage technology to streamline administrative procedures, enhance transparency, and provide greater access to information for parents and learners.

The introduction of the OAS in Gauteng Province was motivated by several factors. Firstly, the manual admissions process was laborious and time-consuming for both parents and education authorities. The OAS aimed to automate and streamline administrative procedures, thereby reducing paperwork and improving efficiency in processing applications. Secondly, the lack of transparency in the traditional process led to uncertainty and dissatisfaction among parents. By digitising the admissions process, the OAS sought to promote transparency by providing real-time updates on application statuses and admission criteria. Thirdly, many parents, especially those from disadvantaged backgrounds, faced challenges in accessing information about available schools and their admission criteria. The OAS aimed to address this by providing a centralised platform where parents could access comprehensive information about schools and the admissions process. Fourthly, the traditional process was susceptible to biases and inconsistencies, potentially disadvantaging certain groups of learners. The OAS sought to promote equity by standardising the admissions process and ensuring fair treatment for all applicants, regardless of their backgrounds.[48]

The key features of the OAS in Gauteng Province include an online application portal, real-time updates on application statuses, comprehensive information about available schools, and multilingual support. These features aimed to provide parents with a convenient and accessible platform to submit

[47]https://oecd-opsi.org/innovations/gauteng-department-of-education
[48]Parker, Hamann & de Kadt (2021).

admission applications and access information about schools. For schools, the OAS streamlined administrative procedures, promoted transparency, and enhanced trust and accountability between schools and parents. Educational authorities benefitted from efficient management and monitoring of the admissions process, while learners gained equitable access to quality education.[49] Despite its potential benefits, the OAS in Gauteng Province has encountered several challenges and criticisms. These include the digital divide, technical glitches, complexity and user interface issues, limited support and assistance, inequities in school allocation, and concerns about data privacy and security. Addressing these challenges is crucial to ensuring that the OAS fulfils its intended purpose of promoting equitable access to education for all learners in Gauteng Province.

Conclusion and Recommendations

The adoption of the OAS in Gauteng Province marked a significant advancement in modernising and refining the school admissions process. The advantages it brings, such as simplifying administrative tasks, fostering transparency, and broadening access to information, are indisputable. Through the digitisation of admissions procedures, the OAS has the capacity to facilitate smoother interactions among parents, learners, and educational authorities, ultimately enhancing the effectiveness and equity of school admissions. Furthermore, the OAS holds promise in promoting the right of access to education for all learners in Gauteng Province. By offering a centralised platform for admissions, it endeavours to level the playing field, ensuring that all families can access identical information and opportunities when seeking admission to schools. This is particularly advantageous for marginalised communities and economically disadvantaged families who may encounter obstacles in navigating conventional admissions procedures.

Nevertheless, it is imperative to recognise and address the challenges and criticisms associated with the OAS. Foremost among these concerns is the digital divide, which has the potential to exacerbate existing disparities in education access. Families lacking reliable internet access or digital literacy skills may encounter difficulties navigating the online application process, thereby potentially limiting their access to preferred schools. To counteract this, measures must be implemented to guarantee that the OAS is accessible to all, including providing support and guidance to families encountering obstacles due to digital disparities.

Additionally, the reliability of the OAS is paramount. Technical malfunctions or system failures may erode confidence in the system and lead to delays or inaccuracies in the admissions process. Educational authorities must invest in robust infrastructure and ongoing maintenance to ensure the seamless operation of the OAS, thereby upholding confidence in its efficacy. Attention must be devoted to accommodating diverse linguistic and accessibility requirements within the

[49]www.gdeadmissions.gov.za

OAS. Incorporating multilingual support and accessibility features can promote inclusivity and ensure that the system is accessible to all users, irrespective of language proficiency or disabilities. By prioritising inclusivity and accessibility, the OAS can effectively cater to the diverse populace of Gauteng and foster equitable access to education for all learners.

While the OAS presents significant potential for enhancing the right of access to education, its success is contingent upon addressing these challenges and criticisms. These issues underscore the necessity for meticulous planning, oversight, and engagement with stakeholders in the development and management of online admission systems. It is argued that the OAS functions as a facilitator rather than a hindrance to accessing education, ensuring that all learners have the opportunity to enrol in schools of their choice without discrimination. It upholds principles of equality and non-discrimination, with no evidence to substantiate claims of unfair disadvantage to any particular group of learners or perpetuation of existing inequalities in education access.[50] Moreover, the OAS adheres to principles of administrative justice, ensuring transparency, accountability, and fairness in the admissions process, by providing clear information to parents about admission criteria, offering avenues for appeal or redress, and safeguarding against arbitrary decision-making.[51]

In compliance with constitutional protections for privacy and data protection, the OAS is mandated to safeguard the confidentiality and integrity of applicant information. Robust measures have been implemented to this effect, with no reported cases or complaints regarding breaches of privacy.[52] Furthermore, the OAS ensures accessibility to all prospective learners and their parents, including those with disabilities or facing barriers related to digital literacy or internet access. Measures are in place, such as District Offices providing assistance to parents who require help with the application process, to accommodate diverse needs and ensure equitable participation. It is argued further that any limitations on constitutional rights imposed by the OAS are justifiable within the framework of the limitation clause, as they are deemed reasonable and necessary in a democratic society. Restrictions on parental choice or preferences are purported to serve a legitimate purpose and are arguably proportionate to that purpose.[53] Moreover, the GDE conducted meaningful consultations with relevant stakeholders, including parents, learners, and education experts, during the development and implementation of the OAS. The system undergoes annual reviews, with identified gaps addressed, ensuring that it reflects the needs and concerns of affected parties and strengthens its legitimacy.

Moreover, the legislative framework delineated above exerts a profound influence on access to basic education in Gauteng Province across several dimensions. By proscribing unjust discrimination and stipulating transparent admission procedures, the legislative framework guarantees that all learners in Gauteng enjoy equal prospects of accessing education, irrespective of their socio-

[50]Section 9 of the Constitution of the Republic of South Africa, 1996.
[51]Section 33 of the Constitution of the Republic of South Africa, 1996.
[52]Section 14 of the Constitution of the Republic of South Africa, 1996.
[53]Section 36 of the Constitution of the Republic of South Africa, 1996.

economic background or personal circumstances. Moreover, this framework ensures equitable distribution of resources among schools in Gauteng, thereby mitigating discrepancies in infrastructure, staffing, and educational materials that could impede access to quality education. In essence, the legislative framework governing the right to access education assumes a pivotal role in fostering fair and inclusive education delivery. Through its mandates for impartial admission protocols, equitable resource allotment, and effective policy execution, these laws contribute substantively to the actualisation of the constitutional entitlement to education for all learners in Gauteng.

Finally, the OAS can be considered a constitutional tool for realising the right of access to basic education. It aligns with constitutional principles and rights, including the right of access to basic education, equality, administrative fairness, privacy, accessibility, proportionality, and meaningful engagement with stakeholders. Challenges to its constitutionality would likely revolve around its adherence to these principles and its impact on the realisation of fundamental rights and freedoms. The OAS also aligns with international law instruments, alongside their corresponding case law interpretations. These instruments serve as fundamental legal frameworks aimed at safeguarding and promoting children's right to access basic education. They furnish governments with essential guidelines for formulating policies and allocating resources to guarantee that education is not only available but also accessible and of commendable quality for all children, irrespective of their socio-economic background or individual circumstances. As Nelson Mandela said "It is not beyond our power to create a world in which all children have access to a good education. Those who do not believe this have small imaginations".[54]

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Ethical Judicial Restraint and the Rule of Law: Strengthening Constitutional Integrity in the UK

*By Emmanuel K Nartey**

This article establishes the theoretical framework for evaluating the concepts of 'elective dictatorship' and 'partisan politics' within the broader context of UK rule of law and ethics. It critically examines these notions to diverge from the conventional practice of parliamentary sovereignty in instances of power abuse. The term 'elective dictatorship' describes a scenario where an elected political party wields substantial power without effective checks and balances, leading to a concentration of power within the ruling party. This situation raises concerns about the erosion of democratic principles and potential power abuse. Closely linked to this is the concept of partisan politics, where alignment with a particular political party leads to abuses of power, challenging the principle of parliamentary sovereignty. Various factors contribute to this dynamic, including ideological, social, and economic considerations. In a healthy democracy, political parties play a crucial role in representing diverse interests and offering voters choices. However, when partisan politics becomes overly polarised and prioritises gaining and maintaining power at any cost, it can foster an elective dictatorship. This article reviews existing literature in this domain and addresses these concepts within the context of the rule of law and ethics. It aims to fill a gap in the literature by establishing the conceptual parameters for 'elective dictatorship' and 'partisan Politics', and argues that when both are used to undermine the judiciary, the court has a duty to depart from traditional norms. It further recommends that courts assess any legislation enacted by the government and Parliament against the rule of law, morality, and ethics.

Keywords: *Elective Dictatorship; Partisan Politics; Ethics; Rule of Law; Parliamentary Sovereignty.*

Introduction

In recent decades, the United Kingdom (UK) has been widely recognised as a leading advocate for liberty and the rule of law.[1] Successive British administrations have taken great pride in cultivating and maintaining this reputation, often referencing the enduring 'golden thread' that weaves through key historical milestones, such as the Magna Carta of 1215,[2] the Bill of Rights in 1689,[3] the European Convention on Human Rights (ECHR) in 1950, and the

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[1]Moravcsik (2000).
[2]Holt, Garnett & Hudson (2015).
[3]Maer & Gay (2009).

Human Rights Act of 1998 (hereinafter HRA 1998).[4] On 18 December, 2008, during the 10th anniversary of the HRA, Jack Straw, then Secretary of State for Foreign, Commonwealth, and Development Affairs, characterised the Act as a 'defining piece of legislation,' a landmark that enshrined the liberties long enjoyed in the UK into a constitutional framework.[5] He expressed the conviction that the HRA would be remembered as one of the most significant legal, constitutional, and social reforms of the government.[6] This discourse highlights the UK's prominent role in championing human rights and its substantial contributions to global efforts in upholding these legal principles. In light of this, the UK's global leadership in the domain of human rights and the rule of law merits commendation for its steadfast commitment to these principles and its notable achievements.[7]

Initially designed to safeguard fundamental rights, the HRA 1998 has seen a decline in support from successive governments, most notably illustrated by the diminishing endorsement from the Labour Government. Concerns have been raised about the Act's impact on human dignity, particularly in relation to its perceived limitations in crime prevention, the treatment of asylum seekers, and the so-called 'war on terror.'[8] This brings up an important question: Should the government be allowed to challenge the court's interpretation and application of the rule of law and the fundamental principle of human dignity? This is more a matter of legal debate than political manoeuvring. It is fundamentally inappropriate for the government to question the court's integrity or the foundational principle of human dignity. Furthermore, notable figures within the Labour Government, including successive Home Secretaries and Lord Chancellors, have expressed their disapproval of the fundamental rights protected by the HRA 1998.[9] Ministers such as David Blunkett, John Reid, and Charles Clarke actively campaigned against the HRA and judicial interpretations, seeking to limit its impact.[10] In response to this opposition, former Prime Minister Tony Blair ordered a review of the Act, and former Lord Chancellor Lord Falconer attempted to restrict judicial interpretations through directives. Such actions by the Labour Government not only contradicted the HRA's original intent and the rule of law but also undermined the core principles of human dignity.

It is crucial to acknowledge that human rights are intrinsic to human existence —they reflect the fundamental nature of being human. As cultural beings, humans create and share complex systems of knowledge, beliefs, values, languages, and customs.[11] Therefore, human rights play a vital role in shaping human identity, influencing behaviour, and establishing a framework for social interaction.[12] In this context, human rights are not privileges granted or withdrawn by the state; rather, they are inherent to human existence. Consequently, it is the responsibility

[4]Schabas (2015).
[5]Hickman (2010).
[6]Hoffman & Rowe (2010).
[7]Lord Dyson (2023).
[8]Ibid.
[9]Kavanagh (2009).
[10]Shami Chakrabarti et al., (2010).
[11]Brown (2007).
[12]Wilson (2014).

of the courts, not the state, to define and interpret the scope of human rights. Human rights, therefore, should not be subject to political decisions or governmental constraints.[13]

Having said that, the incorporation of the European Convention on Human Rights (ECHR) into UK law through the HRA 1998 has established a framework in which certain human rights are recognised as qualified rights.[14] These rights include the right to respect for private and family life (Article 8), the right to freedom of thought, conscience, and religion (Article 9), the right to freedom of expression (Article 10), and the right to freedom of assembly and association (Article 11).[15] Although these rights are fundamental, they are not absolute and may be subject to limitations under specific circumstances. Such circumstances include considerations of national security, public safety, the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others.[16] The governance of these limitations, however, must be firmly rooted in the rule of law as articulated in the HRA rather than being left to political discretion. The Act mandates that any restrictions on these rights must meet the criteria of proportionality, necessity, and rigorous legal scrutiny.[17] The judiciary, serving as an impartial arbiter, is particularly well-suited to ensure that these restrictions are applied in accordance with legal principles and that they do not compromise fundamental human dignity.[18] Consequently, the interpretation and application of human rights under the HRA 1998 should be the exclusive domain of the courts. This judicial oversight is essential in maintaining the rule of law and safeguarding human rights from the influence of shifting political agendas. From this perspective, it can be asserted that political interference in the application of the rule of law and human rights is incompatible with the principles of human dignity and the inherent essence of human existence.

The central question at hand is: How can the integration of the rule of law and ethics mitigate the prevalence of selfishness and self-interest in the conduct of the British Government? The answer does not lie in rigid doctrines or preconceived notions. Rather, it requires a recognition of the inherent self-serving tendencies within political conduct and a concerted effort to establish a clear boundary within politics. This delineation is crucial in shaping British Government policies and aspirations, necessitating careful scrutiny to ensure the continued well-being of democracy, the judiciary, and the broader identity and culture of the nation. Notably, certain high-profile cases have sparked public and governmental discontent, such as the tragic murder of Naomi Bryant by Anthony Rice, who had been released from prison on licence, and the High Court's ruling that prevented nine Afghani hijackers from being returned to Afghanistan,[19] where they faced a

[13]Freeman (1994).
[14]Choudhry (2011).
[15]Ekins (2011).
[16]McGoldrick (2001).
[17]Elliott (2001).
[18]Lee & George (2008).
[19]*S & Ors, R (on the application of) v Secretary of State for the Home Department* [2006] EWHC 1111.

genuine risk of torture or death.[20] In response to these outcomes, politicians like John Reid and Tony Blair publicly criticised the courts, with Reid describing the decisions as 'inexplicable or bizarre' and Blair condemning them as 'an abuse of common sense.' These instances highlight the critical need to clearly define the boundaries within which political decisions are made, particularly when they intersect with fundamental principles of human dignity and the rule of law. This approach is essential for fostering a more accountable and just political environment in the UK.

The question of whether the Government has the legal authority to deport the nine hijackers to Afghanistan is a matter that fundamentally intersects with the principle of human dignity, a concept that extends beyond the immediate interests of the individuals involved to encompass the broader values of humanity. The Government's recourse to public sentiment in criticising the judiciary, however, reflects a problematic and perhaps uninformed engagement with contemporary debates on the rule of law and human dignity. This discussion requires a better approach, particularly within the context of modern UK politics, where these principles must be assessed for their consistency within the broader framework of British governance. While it is tempting to dismiss the principles of judicial independence and parliamentary sovereignty as outdated or irrelevant, such a stance would overlook the complexities inherent in these concepts. Instead, I argue that a comprehensive understanding of the rule of law and ethics necessitates a re-examination of their foundational principles and underlying causes. This critical reflection allows for a more informed discourse, mitigating the superficial or uninformed limitations that often plague discussions on human rights and the rule of law.

To move the discourse forward, it is essential to transcend these limitations and engage in a more holistic exploration of the form and substance of these principles. Such an approach is crucial for elevating the discussion to a level that is both legally and factually sound. Understanding the rule of law and human dignity requires us to identify and address the evolving deficiencies in governmental interpretations and their application of emerging legal principles. By integrating appropriate moral, ethical, and legal frameworks, we can better conceptualise these principles, moving beyond mere definitions to grasp their true nature and strength as anchored in legal doctrine. This refined understanding should enable us to draw meaningful correlations between moral principles, such as virtue, and the concept of the common good within parliamentary sovereignty—distinct from the shifting political will of the government.

This article establishes a theoretical framework for evaluating the concepts of 'elective dictatorship' and 'partisan politics' within the broader context of the rule of law and ethics. It offers a critical analysis of these notions to challenge the conventional understanding of parliamentary sovereignty, particularly in cases where power is misused. Through a comprehensive review of existing literature, the article situates these concepts within the framework of the rule of law and ethics, addressing a notable gap in the literature by defining the conceptual

[20]Kemshall (2012).

boundaries of 'elective dictatorship' and 'partisan politics.' The central argument posits that when these concepts are employed to undermine the judiciary, courts are obliged to deviate from traditional norms to uphold justice. The article advocates for the judiciary to scrutinise government and parliamentary legislation in light of the rule of law, human dignity, morality, and ethics.

The article is structured into four main sections. The first section details the research methodology employed in the study. The second section presents a literature review, examining the impact of 'elective dictatorship' and 'partisan politics' on parliamentary sovereignty and their effects on the rule of law and human dignity. The third section is a discussion that explores deficiencies in the contemporary approach to parliamentary sovereignty within the UK's democratic constitutional framework, followed by recommendations on how courts might ensure the practical application of the rule of law and the protection of human dignity in a democratic society. The final section provides a summary of the study's findings and offers future propositions and practices.

Research Methodology

This research adopts a qualitative, exploratory design to understand and critically evaluate the concepts of 'elective dictatorship' and 'partisan politics' within the broader contexts of the rule of law and ethics. This methodological approach is particularly suited to exploring complex, abstract concepts and their implications within legal and political frameworks. The study uses doctrinal legal analysis and case study methodology to construct a comprehensive theoretical framework.

Doctrinal Legal Analysis

A doctrinal approach is employed to critically examine the legal doctrines and principles underpinning parliamentary sovereignty, the rule of law, and judicial independence. This method involves an in-depth analysis of primary legal sources, including statutes, judicial decisions, and constitutional provisions, to establish the existing legal framework governing the separation of powers and the checks and balances within the UK's political system.

Key sources for this analysis include foundational constitutional documents such as the Magna Carta, the Bill of Rights 1689, the ECHR, and the HRA 1998. Judicial decisions that have shaped the understanding of parliamentary sovereignty and judicial independence will also be scrutinised, alongside statutory provisions outlining the powers and limitations of the executive, legislative, and judicial branches of government.

Case Study Analysis

In-depth case studies are conducted on specific instances where the UK government's actions have been perceived as examples of elective dictatorship or extreme partisan politics. These case studies illustrate the practical implications of

these concepts and provide empirical evidence to support the theoretical arguments presented in the article.

Notable case studies include the prorogation of Parliament in 2019 and the legal challenges that followed, legislative actions taken by the government during periods of heightened political polarisation, and judicial decisions where courts have had to balance parliamentary sovereignty against the rule of law.

Data Collection and Analysis

Data for this research is gathered from a variety of sources, including primary sources such as legislative texts, court rulings, parliamentary debates, and government publications. Secondary sources include academic journals, books, legal commentaries, and policy analysis reports. However, expert interviews with constitutional scholars, legal practitioners, and political scientists were not conducted, which limits practical and primary insight into the contemporary challenges posed by elective dictatorship and partisan politics.

The data collected is analysed using thematic analysis to identify key themes and patterns related to the exercise of political power and its impact on the rule of law, ethics, and human rights. The analysis focuses on drawing connections between the theoretical framework established in the literature review and the empirical evidence gathered through case studies.

Literature Review

In the field of political theory, governance, and constitutional law, the scrutiny of 'elective dictatorship' and 'partisan politics' has gained significant importance,[21] compelling scholars and analysts to carefully examine the delicate balance between electoral mandates, the rule of law, and human rights.[22] Notably, previous discourse has often neglected the crucial role of ethics in maintaining this balance, particularly in ensuring that power is exercised in a manner consistent with the rule of law and the fundamental principle of human dignity.[23] This literature review seeks to address this gap by exploring the complexities of elective dictatorship and partisan politics within the UK's parliamentary system, focusing on how the authority conferred upon elected leaders can incline towards dictatorial tendencies. The core of this analysis is the juxtaposition of the democratic mandate with the ethical obligation to uphold the rule of law and human dignity. The section aims to uncover the challenges and implications associated with the potential erosion of democratic values when confronted with unchecked power in the UK. By engaging in this analysis, the section's primary objective is to elucidate the relationship between democratic legislative processes, ethical considerations, and the imperative to safeguard the rule of law and fundamental human dignity.

[21]Hailsham Lord (1976)
[22]Grant (2009).
[23]Aldons (2002).

The UK's constitution is characterised by the absence of a single, written document or law that explicitly defines the rights and responsibilities of citizens and the government.[24] While this unwritten nature allows for flexibility and organic development, it also poses the risk of parliamentary sovereignty being abused. The lack of a codified constitution permits partisan politics to exert undue influence over the legislature, leading to manipulation and unethical practices that can undermine democratic processes.[25] The notion that Parliament can amend any law, including constitutional law, remains a subject of significant debate, especially within a modern democratic society where political allegiance may sometimes overshadow the broader national interest.[26] Although theoretical constraints on constitutional powers exist through political checks and balances, recent events have challenged the efficacy of these safeguards. Notable examples include the Internal Market Bill, which threatens the rule of law, and the Overseas Operations (Service Personnel and Veterans) Act 2021, which violates international prohibitions on torture and further undermines legal principles. These instances reflect a broader political and institutional crisis within the UK, contributing to post-Brexit instability and damaging the nation's democratic standing on the global stage, with adverse economic consequences. As the UK continues to grapple with reputational damage, the pressing issue lies in addressing these challenges and preserving the integrity of governance and parliamentary sovereignty. Immediate action is required to reassess the UK's constitutional principles and establish clear guidelines that ensure effective governance while upholding the rule of law and the fundamental principle of human dignity.

In the context of the UK constitution, which is centred on the principle of parliamentary sovereignty, Parliament holds the authority to delegate powers to Ministers with relatively few constraints or conditions imposed by Parliament itself.[27] Ministers are then empowered to exercise these delegated powers at their discretion, though subject to judicial review. In practice, a government with a strong majority can secure the passage of almost any legislation it desires, thereby enabling it to achieve its legislative objectives with relative ease. This concentration of power has been characterised as an 'elective dictatorship,' a term coined by Lord Hailsham in 1976 to critique the potential for excessive executive dominance:

> '*This concern was later articulated by the House of Lords Constitution Committee, particularly in relation to the European Union (Withdrawal) Act. The Committee observed that the Act's extensive and overlapping delegated powers effectively granted the Government an unprecedented and extraordinary range of powers. This, they argued, would fundamentally disrupt the constitutional balance of power between Parliament and the Government, constituting a significant and unacceptable transfer of legal authority from Parliament to the executive.*'[28]

[24]Horsley (2022).
[25]Flinders (2009).
[26]Sargeant, Coulter, Pannell, Mckee & Hynes (2023).
[27]Elliott (2002).
[28]European Union (Withdrawal) Bill: interim report (parliament.uk), para 44.

While some may argue that certain government actions are unconstitutional, a more precise characterisation would be the 'abuse' of parliamentary sovereignty. This raises a crucial question: Why is it necessary to establish rules governing parliamentary sovereignty, particularly concerning the behaviour of legislatures and the conduct of the ruling political party? Moreover, how can the UK's somewhat flawed democratic process be enhanced to better safeguard democratic principles? An examination of the evidence reveals that parliamentary sovereignty in the UK has, at times, been utilised as a mechanism for 'elective dictators' to validate their democratic legitimacy, rather than as a genuine commitment to upholding the rule of law and the fundamental principle of human dignity.[29] This interpretation suggests that, within the context of contemporary UK governance, Parliament may be perceived as a relic of traditional practices rather than as a fully realised embodiment of modern democratic values that prioritise the rule of law and human dignity.[30] Given these concerns, a comprehensive reassessment of the concept of parliamentary sovereignty within the UK constitution is warranted, particularly in light of the evolving dynamics of society.[31]

The concept of 'elective dictatorship,' as explored by various scholars, highlights the erosion of governmental accountability within democratic systems, particularly in the context of British politics. Harmer associates this term with the weakening of Parliament's ability to effectively oversee and control the government, primarily due to the dominance of disciplined political parties that blur the lines between the legislative and executive branches.[32] In an ideal democracy, Parliament should possess the power to dismiss the executive if it fails to meet its obligations. However, in an elective dictatorship, the executive, which already dominates Parliament, becomes accountable primarily to its party rather than to Parliament itself. This phenomenon is particularly evident in modern British politics, where a government with a strong parliamentary majority can undermine Parliament's capacity to scrutinise and regulate the executive. As Lord Hailsham noted, this creates a situation where the executive is rarely held accountable by party discipline, especially in the lower house—a problem more pronounced in the UK than in other democracies facing similar issues.

Aldons challenges this perspective, arguing that labelling the UK's representative parliamentary democracy as an elective dictatorship is both 'inappropriate and unproductive.'[33] He contends that the current system lacks the accountability mechanisms that were present during the so-called golden age of responsible government.[34] However, this argument is contentious and may lack depth, as it overlooks the complexities and challenges of modern democracy, where the separation of powers between the executive and the legislature is not as clear-cut as it once was. The inability of Parliament to effectively delineate its boundaries and assert its authority raises critical questions about the extent of executive power

[29]Gordon (2015).
[30]Ekins (2019).
[31]Ewing (2017).
[32]Hamer (1994).
[33]Evans (1993).
[34]Evans (1992).

and the potential risks of constitutional collapse. The literature suggests that while achieving a complete separation of powers between the executive and Parliament may be constitutionally challenging, reinforcing the role of the judiciary could mitigate some of the negative consequences of parliamentary sovereignty.[35] This approach emphasises the importance of integrating the rule of law and ethics into the exercise of parliamentary sovereignty. Without these guiding principles, parliamentary sovereignty risks becoming an ungrounded concept, disconnected from the broader framework of law and governance. Historically, societies have been governed by rules and virtue, with parliamentary sovereignty emerging as a later development. To dismiss the rule of law and ethics in discussions of parliamentary sovereignty undermines the foundational social and constitutional norms that have historically guided governance.[36]

Dearlove and Saunders contribute to this discourse by examining the British Constitution in the 1970s, particularly in light of Lord Hailsham's concept of elective dictatorship and Lord Denning's concerns about the misuse of power.[37] They argue that parliamentary sovereignty, as currently understood, lacks sufficient checks on the powers of Parliament, particularly given the rise of partisan politics and government intervention. This perspective aligns with the notion that the British Constitution, once seen as conducive to responsible party behaviour, now facilitates an elective dictatorship where party ambitions overshadow the legislature's traditional role in checking executive power.[38] Bogdanor further expands on this discussion by referencing Dicey's interpretation of parliamentary sovereignty,[39] noting that Dicey would have likely rejected the modern misinterpretation that equates parliamentary sovereignty with unchecked governmental power.[40] Bogdanor critiques Thatcher's centralisation of power, which he views as a departure from constitutional norms and an example of elective dictatorship.[41] He suggests that parliamentary sovereignty should be understood in terms of adherence to the rule of law and the fundamental principle of human dignity, echoing the Greek philosophical concept of virtue or the good life. Within this framework, parliamentary sovereignty is not the ultimate source of legislation but rather a mechanism that should operate within a system of checks and balances.

The rapid evolution of the British Constitution since 1997 has raised significant concerns among scholars, particularly regarding the unchecked power of the executive branch.[42] This evolution, facilitated by the absence of a formal process for constitutional changes, has allowed successive governments to reshape state structures to align with their political agendas, often without consulting other governmental institutions or seeking public approval.[43] Such actions have notably

[35]Carolan (2009).
[36]Salter (2022).
[37]Saunders & Dearlove (1984).
[38]Zecca (1992).
[39]Cosgrove(2004).
[40]Bogdanor (1996).
[41]Goodwin & Duncan (1989).
[42]King (2007).
[43]Jowell (2007).

intensified since 1997, when governments began using simple parliamentary majorities to enact substantial changes to the judicial system and the structure of governance in the UK.[44] These changes include diminishing the traditional powers of the Lord Chancellor, implementing fixed-term parliaments, and devolving legislative powers to specific regions.[45] The ethical and moral implications of these constitutional shifts are contentious, as they often lack the necessary consultation and oversight, raising questions about the methods and motivations behind such changes.

Intellectuals and legal experts have expressed concern that these alterations were introduced without thorough consultation processes or referendums, undermining the separation of powers and the concept of parliamentary sovereignty.[46] Instead, the executive has leveraged its parliamentary majority to assert political dominance, setting a potentially dangerous precedent for the future of the UK Constitution and political landscape.[47] This trend is not necessarily a pessimistic view, but it highlights the need for careful consideration and scrutiny to prevent instability in the UK's democratic system.

The UK government's increasing willingness to modify long-standing traditions and constitutional principles for short-term political gains indicates a lack of ethical commitment to upholding the rule of law and the fundamental principle of human dignity.[48] Recent conflicts between the government and senior judges over judicial power, as well as challenges to the civil service's constitutional standing, represent a significant departure from the norms of the past several decades.[49] This shift suggests that the supremacy traditionally granted to Parliament as an absolute body may no longer be a reliable safeguard if the executive is willing to compromise the independence of the judiciary and the civil service. The government's consistent assertion of a democratic mandate to override opposition and bypass established rules and structures is a troubling defence against the rule of law and fundamental principles of human dignity. Together, these developments raise serious concerns about the future of democracy in the UK, suggesting that the country may be on a path towards a democratic crisis unless corrective measures are taken.

Under the current Conservative government, these issues have become even more pronounced. For instance, Prime Minister Boris Johnson's belief that he had a mandate to challenge the established boundaries of the UK constitution has been criticised as ill-considered and inappropriate for a democratic nation.[50] This approach has created tensions between ministers and the civil service, with the government's actions being seen as morally and ethically questionable. The civil service plays a crucial role in monitoring and regulating the boundaries that the

[44]Turpin & Tomkins (2007).
[45]Smith (2005).
[46]Blick (2016).
[47]Foster (2021).
[48]Norton (2018).
[49]Rutter (2022).
[50]Lindsay (2020).

government attempts to push, and when the government disregards their counsel, it undermines the stability and predictability of the political system.[51]

The absence of moral integrity and ethics in the government's actions, particularly in relation to parliamentary sovereignty, underlines a critical distinction between engaging in morally and ethically questionable behaviour and actions that are entirely devoid of moral integrity. Actions lacking in moral integrity are more likely to face censure and condemnation, as seen in the government's handling of Brexit and its willingness to violate both domestic and international law.[52] The Johnson government's approach to Brexit, particularly its attempts to bypass Parliament and the law, reflects a troubling disregard for the rule of law and ethical governance.[53] This conduct, coupled with the government's open declaration to breach international law in 'limited and specific' ways, exemplifies a broader ethical and moral deficit in contemporary British politics.

Numerous analysts argue that the growing disconnect between UK citizens and their elected representatives is a significant factor contributing to the rising dissatisfaction, dysfunction, and declining respect for regulations among British politicians.[54] However, this viewpoint captures only a partial aspect of the broader discourse in British politics. While it is true that transparency in British politics has ostensibly increased over recent decades—exemplified by initiatives such as the televised Prime Minister's Question Time and the broadcasting of Parliamentary proceedings—this increased visibility has not necessarily translated into a more informed or engaged citizenry.[55] These initiatives were intended to enhance public access to government activities and subject the political elite to greater media scrutiny.

Despite these efforts, the claim that ordinary citizens now possess meaningful insight into government operations remains tenuous when measured against the prevailing attitudes and practices of British politicians. There is a persistent tendency among some political figures to manipulate rules to achieve their objectives, often invoking parliamentary sovereignty as a means to circumvent the rule of law and fundamental principles of human dignity.[56] This behaviour challenges the very notion of transparency and undermines the idea that simply making information available equates to genuine accountability. The underlying issue lies in the constitutional balance of power and the ethical considerations that should guide political conduct. To fully understand the dangerous precedent set by certain British politicians and the resulting power imbalance among government institutions, Lord Hailsham's concept of 'elective dictatorship,' introduced in 1976, is particularly pertinent. This term encapsulates the idea that a government with a strong parliamentary majority can effectively operate with minimal checks on its power, leading to a form of democratic governance that is more authoritarian in practice.

[51]Garnett (2021).
[52]Wille & Martill (2023).
[53]Parker, Payne, Foster & Pickard (2020).
[54]Le Roux (2014).
[55]Riddell (2014).
[56]Weinberg (2023).

The relationship between elective dictatorship and partisan politics is deeply intertwined within democratic systems in the UK. Partisan politics, characterised by competition and rivalry between political parties, often paves the way for elective dictatorship, particularly when one party secures a substantial legislative majority.[57] In such scenarios, the dominant party wields significant influence, controlling the legislative agenda, shaping key appointments, and rapidly implementing policies. The diminished influence of the opposition, which is frequently a consequence of partisan dynamics, further exacerbates an environment where unchecked executive power can thrive.[58] Party cohesion and ideological alignment within the ruling party bolster its authority, enabling the swift enactment of policies with minimal debate. This concentration of power can undermine traditional checks and balances within the democratic system, raising serious concerns about accountability and the potential for a democratic deficit.[59] Addressing the challenges posed by this relationship may require reforms focused on strengthening democratic principles, enhancing transparency, and reinforcing the role of opposition forces within the political landscape. The dynamics of majority rule, party dominance, and ideological alignment are central to the political environment, and mitigating the risks associated with this relationship is crucial for preserving a healthy and functional parliamentary sovereignty.

To establish a more effective system of checks and balances in contemporary British politics, it is crucial to strengthen judicial independence. This can be achieved by implementing measures designed to insulate the judiciary from external influences and safeguard its autonomy. Several key measures include:

- **Establishing Clear Protocols and Guidelines**: Develop and enforce clear protocols and guidelines that delineate the appropriate channels and procedures for communication between the executive and the judiciary. Defining the boundaries of authority for each branch will help prevent undue interference.
- **Facilitating Regular Consultations**: Encourage regular, structured consultations between the executive and the judiciary to address matters of shared interest, such as legal reforms and policy implications. Open and transparent dialogue can foster mutual understanding and respect.
- **Providing Training and Education**: Implement training and educational programmes for members of both the executive and the judiciary to enhance their comprehension of each other's roles, responsibilities, and constitutional limitations. This initiative would support a better-informed and more collaborative relationship.
- **Ensuring Transparent Appointment Processes**: Guarantee that the processes for judicial appointments are transparent, merit-based, and free from political interference. This is essential for maintaining the judiciary's independence and public confidence in its impartiality.

[57]Portis, Gundersen & Shively (Eds.) (2012).
[58]Schonfeld & Winter-Levy (2021).
[59]Schmidt (1996).

- **Upholding Respect for Judicial Independence**: Emphasise the critical importance of respecting judicial independence and the decisions of the courts, even in politically sensitive cases. Public statements or actions that could undermine the judiciary's integrity should be discouraged.
- **Collaborating on Legal Reforms**: Promote collaboration between the executive and the judiciary in the development of legal and judicial reforms. Involving both branches in the legislative process will help ensure that laws are constitutionally sound and practically effective.
- **Conducting Public Awareness Campaigns**: Launch public awareness campaigns to educate citizens about the significance of an independent judiciary and the principle of separation of powers. Building public support for these concepts is essential for their preservation.

By adopting these measures, the relationship between the executive and the judiciary can be cultivated to be more collaborative and respectful, thereby enhancing the effective functioning of democratic institutions.

Disch's analysis of Pitkin's concept of representation reveals a more radical interpretation than is commonly acknowledged.[60] Pitkin's theory, as interpreted by Disch, overlooks the crucial role that political parties and partisanship play in the dynamic process of representation. This omission is significant, particularly in light of Disch's broader critique of the two-party system in the United States. In *The Tyranny of the Two-Party System,* Disch argues that the dominance of two major political parties has created a form of political 'tyranny,' which restricts the diversity of political representation and marginalises alternative voices. According to Disch, the two-party system limits the political choices available to voters, reducing complex issues to oversimplified binary options, and thereby failing to adequately reflect the broad spectrum of opinions within society.

However, Disch's critique of the two-party system might be seen as overly simplistic, as it attributes voter discontent primarily to the limitations of the two-party structure. This perspective does not sufficiently consider other contributing factors, such as the influence of campaign finance, media dynamics, and systemic issues that also play significant roles in political disillusionment. Moreover, Disch may underestimate the ideological diversity within the two major political parties, which, despite some homogenisation, still encompass a range of perspectives. Voters often align themselves with the party that most closely aligns with their overall preferences, and the challenge lies in translating this alignment into policies and legislation that serve the collective welfare.

Disch's analysis point out the potential drawbacks of the two-party system, calling for a re-evaluation of the political landscape to enhance inclusivity, representation, and responsiveness to the electorate's diverse needs.[61] The lack of emphasis on party representation is not unique to Disch; it reflects a broader trend in recent political theories on representation, where parties and partisanship are often absent from the discourse. This omission represents a missed opportunity to

[60]Disch (2002).
[61]Pitkin (2023).

deepen our understanding of how party dynamics can enrich democratic processes. A renewed focus on the role of parties in representation could lead to improvements in modern politics. To address the limitations of the two-party system and excessive partisanship, several strategies can be considered:

- **Electoral Reforms**: Implementing proportional representation or ranked-choice voting systems could ensure that a wider array of political perspectives is represented in legislative bodies, potentially breaking the binary nature of the two-party system and encouraging the emergence of multiple parties.
- **Campaign Finance Reform**: Stricter campaign finance regulations could reduce the dominance of wealthy interest groups and corporations, allowing for a more diverse range of candidates to participate meaningfully in the political process.
- **Encouraging Multiparty Systems**: Promoting the development of multiparty systems, where smaller parties have a realistic chance of gaining seats, could foster a more inclusive political landscape and prevent the concentration of power within a few major parties.
- **Enhancing Civic Education**: Investing in civic education programmes to inform citizens about the importance of political pluralism and the value of supporting a variety of parties could lead to a more informed electorate that is open to alternative candidates and parties.
- **Addressing Gerrymandering**: Implementing measures such as independent redistricting commissions could prevent gerrymandering, ensuring that electoral boundaries are drawn fairly and that parties and candidates are fairly advantaged or disadvantaged.
- **Promoting Coalition Governments**: Encouraging the formation of coalition governments, especially in parliamentary systems, could foster collaboration among multiple parties, reducing the adversarial nature of politics.
- **Expanding Access to Debates and Media Coverage**: Ensuring that all candidates, regardless of party affiliation, have equal access to debates and media coverage could help present a more diverse range of ideas to the electorate.
- **Supporting Grassroots Movements**: Encouraging grassroots movements and community-based political initiatives could empower individuals and groups to engage in politics outside traditional party structures, promoting a more bottom-up approach to representation.
- **Encouraging Cross-Party Collaboration**: Creating mechanisms that incentivise cross-party collaboration on key issues could reduce polarisation and encourage politicians to work together in the broader public interest.
- **Institutional Reforms**: Exploring broader institutional reforms, including changes to electoral systems and party funding mechanisms, could address the structural issues contributing to the dominance of two-party systems.

By implementing these strategies, the political environment could become more inclusive, responsive, and reflective of society's diverse needs and opinions. The evolving discourse on representation, increasingly aligned with normative democratic theory, emphasises the need for a better understanding of how parties and partisanship function within representative democracy.[62] This perspective suggests that political representation should be viewed as a relationship between individual citizens and their elected representatives, with parties and partisanship serving as facilitators rather than dominant forces.

Discussion

The analysis in the literature of elective dictatorship and partisan politics within the framework of the rule of law and ethics presents a complex interplay of governance, legal principles, and moral considerations. It explores how these dynamics influence the foundations of democracy, the rule of law, and the ethical obligations inherent in a just and equitable society. For example, Tony Blair's decision to review the HRA 1998 highlighted a crucial moment in the balance between parliamentary sovereignty, the rule of law, and individual rights in the UK. The review was driven by the need to reconcile government policy with court rulings that appeared to diverge from the government's stance, particularly in relation to interpretations of the ECHR in other European Union (EU) countries.[63] Blair's initiative also aimed to amend the HRA 1998 to balance individual rights with the community's right to basic security. However, this approach raises significant concerns regarding the thoughtful consideration and timing of his actions. Blair's strategy appeared to be an attempt to use parliamentary sovereignty to override court judgments, a move that is problematic as it undermines the independence of the judiciary and the fundamental principles of the rule of law and human dignity. This approach risks distorting the legal system and weakening the checks and balances essential to democratic governance. While the government possesses the freedom to pursue its political objectives, it is critical that these efforts do not compromise the integrity of the courts or the rule of law. Any deviation from these principles suggests that Parliament can enact laws based solely on its preferences, a view that lacks contemporary validity in both theory and practice.[64]

This situation underlines the need for legal principles to evolve as societies face increasingly complex issues. It also highlights the importance of morality and ethics in governance, which play a pivotal role in shaping perceptions of parliamentary sovereignty and the judiciary. The Joint Committee on Human Rights' November 2006 report criticised senior ministers, including the Prime Minister, for unfounded claims that the HRA 1998 or its interpreters were responsible for unpopular events. The committee's findings emphasised the government's failure to correct these errors publicly, despite the Lord Chancellor's

[62]Sabl (2015).
[63]Temko & Doward (2006).
[64]Young (2012).

assurance of a commitment to human rights across the government. This reflects the committee's substantial view of the rule of law and human rights, likely encompassing concepts of liberty and respect for private life.[65] The Labour Government's 2009 green paper, 'Rights and Responsibilities,' reiterated the significance of the HRA 1998 and proposed a new 'Bill of Rights and Responsibilities.' This document suggested that while human rights are not necessarily contingent on responsibility, future legislation might consider the applicant's behaviour and public safety. The paper's emphasis on responsibilities alongside rights adds a layer of complexity to the ongoing discourse on human rights and the rule of law.[66] In summary, the debate over the HRA 1998 and parliamentary sovereignty reveals the limitations of relying solely on legal rules and political systems to guide governance. The rule of law and the principle of human dignity must be rooted in the ethical and moral conduct of government, ensuring that these values are not just formalities but intrinsic to the behaviour of the executive. As such, the intersection of morality, ethics, and virtue with legal principles is essential for maintaining a just and equitable society, where the rule of law and human dignity are upheld and respected.

The Conservative Party's opposition to the HRA 1998 and its fundamental principle of human dignity has intensified over time. However, a notable shift occurred under David Cameron's leadership. In a 2006 speech at the Centre for Policy Studies, Cameron announced the party's intention to replace the HRA 1998 with a British Bill of Rights while retaining membership in the ECHR.[67] This proposal raised concerns, suggesting a possible misunderstanding within the Conservative Party regarding the rule of law and human dignity. Whether or not the HRA 1998 is replaced, the UK remains bound by its obligations under the ECHR unless it legislates to withdraw from the convention, a step that this analysis does not recommend for current or future governments. Should withdrawal be unfeasible, the courts must be ethically and morally committed to safeguarding the rule of law and human dignity against any political distortion.[68]

Since the Brexit referendum, five Conservative Prime Ministers have consistently pursued policies that have undermined the rule of law and the fundamental principle of human dignity in the UK. This trend not only tarnishes the UK's reputation as a global champion of these principles but also raises serious concerns about the Conservative Government's dedication to upholding them domestically.[69] The actions of these five Prime Ministers have systematically eroded the foundations of the rule of law and human dignity. Post-Brexit, and amid the challenges of the COVID-19 pandemic, successive Conservative Governments have introduced legislation that expands state power while reducing the accountability of government officials.[70] These measures are often at odds with the UK's commitments under the ECHR. Notable examples include:

[65]Travis (2006).
[66]Bingham (2011).
[67]Cameron (2006).
[68]Dzehtsiarou, Lock, Johnson, De Londras, Greene & Bates (2015).
[69]Siddique (2021).
[70]Mitsilegas & Jofre (2023).

- **The Covert Human Intelligence Sources (Criminal Conduct) Act 2021**, which grants immunity to undercover operatives for criminal acts, contravening the principle of equal treatment under the law and restricting justice for victims.
- **The Overseas Operations (Service Personnel and Veterans) Act 2021**, providing immunity to military personnel from prosecution for specific offenses, further diluting accountability.
- **The Judicial Review and Courts Act 2022**, which limits the ability of the High Court to review decisions by certain public bodies, thereby restricting access to justice for those affected by unlawful government actions.
- **The Nationality and Borders Act 2022**, which raises the standard of proof for refugee status and reduces support for vulnerable asylum seekers, conflicting with the UK's international obligations.
- **The Police, Crime, Sentencing, and Courts Act 2022**, and **The Public Order Act 2023**, which introduce new protest-related offenses and enhance police powers, disproportionately targeting minority communities and curbing fundamental protest rights.

These legislative actions signal a concerning shift away from the UK's longstanding commitment to the rule of law and human dignity, demanding urgent reassessment of its global leadership role and domestic governance practices. Therefore, it may be assumed that the erosion of the rule of law and fundamental human dignity in the UK can be attributed to the phenomena of elective dictatorship and partisan politics. Partisan politics further exacerbates this issue, as political loyalty have overshadowed legal and ethical considerations. Decisions influenced by party allegiance often prioritise political gain over the broader principles of justice and human rights. The legislative measures introduced under recent Conservative Governments, such as the Covert Human Intelligence Sources (Criminal Conduct) Act and the Nationality and Borders Act, illustrate how partisan interests can compromise fundamental values. This alignment of political expediency with legislative action reveals the detrimental impact of both elective dictatorship and partisan politics on the integrity of governance and the safeguarding of human rights.

Conclusion

In this intersection, challenges emerge as the ethical duty to uphold justice sometimes conflicts with the practical realities of political manoeuvring. Striking a delicate balance requires a nuanced understanding of the interdependencies between political governance, legal structures, and the ethical obligations embedded within the rule of law and fundamental principle of human dignity. In conclusion, the inclusive analysis of elective dictatorship and partisan politics under the rule of law and ethics unveils a complex web of challenges faced by democratic societies. Recognising the interconnectedness of governance, legal

frameworks, and ethical responsibilities is paramount for the preservation of a just and equitable society. The ongoing examination of these dynamics should inform our collective efforts to fortify democratic institutions, ensuring they remain steadfast in upholding both the rule of law and human rights standards.

In the context of the above discussion, let us consider a hypothetical example to illustrate the argument that, when fundamental principles are compromised through legislative processes and executive actions, the court has a moral and ethical obligation to intervene. Imagine a scenario where a parliament, driven by political expediency, passes a law that infringes upon basic human rights protected by the Constitution. This law, although technically within the legislative authority, violates fundamental principles of justice, fairness, and the rule of law. It may grant excessive powers to the executive, curtail individual freedoms without due process, or discriminate against certain groups. In such a case, the court, as the guardian of the rule of law and the protector of fundamental principles, faces a moral and ethical dilemma. The court may argue that the intention of the parliament is not to undermine the very principles that form the bedrock of a just society. Instead, it may assert that parliament, in its legislative function, does not intend to pass an act that contradicted the rule of law and ethical standards. The court, cognisant of its role in upholding the constitution and safeguarding fundamental principles, might intervene to interpret the legislative intent in alignment with these principles. The argument here is that the parliament, in its pursuit of policy goals, may inadvertently stray from the ethical and moral foundations embedded in the rule of law. In this light, the court may see itself as the ethical guardian, ensuring that the legislative process does not compromise the core values that underpin a just and democratic society.

By circumventing the apparent intentions of the parliament, the court would be acting as a check against the potential abuse of power, upholding the moral and ethical imperatives that transcend the purely legalistic interpretation of statutes. This intervention becomes a safeguard against the erosion of individual rights and the subversion of democratic principles, emphasising the court's duty to preserve the ethical fabric of the legal system. In summary, this example illustrates the argument that, when faced with legislation or executive actions that contravene fundamental principles, the court may assert its moral and ethical duty to interpret legislative intent in line with the rule of law and ethical standards. In doing so, the court becomes a bulwark against the inadvertent transgressions of the parliament, ensuring that the legislative process aligns with the moral and ethical imperatives of a just and democratic society. Considering the above discourse, the enhancement of judicial restraint in the UK constitution through the integration of the rule of law and ethical considerations requires the cultivation of a legal atmosphere that promotes principled decision-making while preserving the integrity of the judiciary. A key recommendation in this regard could be:

- **Formulation of Ethical Principles:** Develop and prescribe a set of ethical guidelines specifically tailored to judicial restraint. These guidelines should outline the ethical considerations judges must take into account when deciding whether to exercise restraint or intervene in legislative and

executive actions. This would contribute to a more principled and consistent approach.

- **Balancing Competing Ethical Values:** Acknowledge and address the inherent tension between the values of judicial restraint and the imperative to protect constitutional rights. Clearly delineate circumstances where ethical considerations may warrant a more restrained approach and situations where intervention is ethically justified to prevent constitutional violations or protect fundamental rights.
- **Continuous Ethics Training for Judges:** Implement ongoing ethics training programmes for judges that specifically focus on the ethical dimensions of exercising judicial restraint. This training should include case studies, hypothetical scenarios, and discussions to help judges navigate complex ethical dilemmas related to constitutional interpretation and restraint.
- **Independent Ethics Oversight Body:** Consider the establishment of an independent ethics oversight body composed of legal scholars, ethicists, and retired judges. This body could provide guidance on ethical questions related to judicial restraint, offer opinions on specific cases, and contribute to the development of best practices in maintaining a balance between restraint and intervention.
- **Public Awareness and Accountability:** Foster public awareness of the ethical considerations involved in judicial restraint. Transparency about the ethical framework guiding judicial decisions enhances public trust and accountability. Judges should be mindful of the need to communicate their ethical reasoning in decisions, especially in cases where restraint may impact constitutional rights.
- **Integration of Ethical Review in Judicial Appointments:** Integrate a rigorous ethical review process into the judicial appointment process. This ensures that individuals appointed to the judiciary have a demonstrated commitment to ethical considerations, including a nuanced understanding of when restraint is ethically appropriate and when it may compromise constitutional principles.
- **Ethics Committees within the Judiciary:** Establish internal ethics committees within the judiciary tasked with periodically reviewing and updating ethical guidelines. These committees could also provide a forum for judges to seek guidance on ethical concerns related to judicial restraint, fostering a culture of ongoing ethical reflection.
- **Regular Assessment of Ethical Decision-Making:** Institute mechanisms for the regular assessment of judges' ethical decision-making, with a specific focus on cases involving judicial restraint. This could involve peer reviews, self-assessments, or external evaluations to ensure that ethical considerations remain at the forefront of judicial decision-making.
- **Public Consultation on Ethical Guidelines:** Involve the public in the development and review of ethical guidelines for judicial restraint. Public input can offer diverse perspectives and contribute to the legitimacy of the

ethical framework guiding the judiciary. It also helps to align ethical considerations with societal values.

By focusing on the ethical dimensions of judicial restraint and integrating the rule of law principles, these recommendations aim to enhance the credibility and effectiveness of the judiciary in navigating the delicate balance between restraint and intervention in the UK constitutional context.

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The Pragmatic Impact of Grammatical Structures in Courtroom Interpretation and Translation

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Courtroom interpretation and translation require a nuanced understanding of not only vocabulary but also the pragmatic impact of grammatical structures. This paper examines the pragmatic impact of grammatical structures on interpretations in the Kisii Law Courts. Using data collected from actual proceedings, the paper analyzes how seemingly minor grammatical differences can have significant consequences for the accuracy and fairness of the legal process. By applying Mey's (2001) Pragmatic Act Theory (PAT), we analyze how modal verbs, passive voice and nominalisation function within the context of the courtroom, influencing the interpretation of witness testimonies, judge's instructions, and lawyer's arguments. Specifically, we explore the use of passive voice within the context of PAT, analyzing how these choices interact with the social context and speaker intention. We will also examine the pragmatic effects of passivisation on agency, responsibility, and the focus of witness testimony, examining how they shape the understanding of events and culpability. It is crucial for court interpreters and translators to accurately convey the intended meaning and effects of pragmatic acts in court proceedings.

Keywords: *Pragmatic Act Theory, court interpretation and translation, passive voice, nominalisation, modal verbs*

Introduction

The courtroom is a unique social and linguistic environment where precise communication and clarity are paramount in determining legal outcomes[1]. In this setting, the accuracy and clarity of interpretation can significantly influence legal outcomes and ensure that justice is administered fairly. When legal proceedings involve multiple languages, the role of the interpreter or translator becomes crucial. Interpretations play a crucial role in ensuring fair trials for participants who do not share the language(s) of the court. They provide a vital link that enables participants in proceedings to understand and participate fully in the judicial process. However, the act of interpretation goes beyond simply transferring literal meaning. It involves conveying the nuances, context, and

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[1] Coulthard & Johnson (2007); Kibee (2016); Guillén-Nieto & Stein (2022).

cultural subtleties of the spoken word, which are crucial for ensuring that all parties fully understand the proceedings and can participate effectively. Grammatical structures often carry subtle nuances that can significantly alter the intended meaning. This deeper level of interpretation is essential for maintaining the integrity of the judicial process and safeguarding the rights of non-native speakers. Grammatical choices made by the interpreter can subtly influence how the interlocutors perceive the weight and intent of spoken words. The way an interpreter chooses to construct sentences, emphasise certain words, and convey tone can significantly affect the understanding and interpretation of legal testimony and arguments. These nuances are critical in a courtroom setting, where the precise meaning and implications of language can impact judicial outcomes. This paper examines the pragmatic impact of grammatical structures on interpretations in the Kisii Law Courts, utilising the framework of Mey's[2] Pragmatic Act Theory (PAT). By applying this theory, we will analyse how modality, nominalisation and passivisation function within the context of the courtroom, influencing the interpretation of witness testimonies, judge's instructions, and lawyer's arguments. Specifically, we will explore how modal verbs influence the interpretation of obligation, possibility, and certainty in courtroom exchanges, considering their role within the power dynamics and social hierarchy of the courtroom setting. Furthermore, we will examine the pragmatic effects of passivisation on agency, responsibility, and the focus of witness testimonies, analysing how they shape the understanding of events and culpability. By analysing these aspects through the lens of PAT, this paper aims to shed light on the nuanced interplay between grammar, social context, and meaning in the courtroom setting of the Kisii Law Courts.

Literature Review

Modal Verbs, Pragmatics, and Legal Discourse

Modal verbs are important linguistic tools in legal settings because they help frame the terms of legal arguments and demarcate the boundaries within which legal decisions are made. Their precise interpretation can affect the outcome of legal proceedings by clarifying the extent of duties, rights, and prohibitions. Available studies emphasise how modal verbs shape the interpretation of legal documents and courtroom interactions, conveying obligation, permission, possibility, certainty, and necessity[3]. Furthermore, these investigations underscore the broader significance of modal verbs in legal contexts by highlighting how they contribute to the construction of legal norms and the articulation of judicial reasoning. By examining the usage and function of modal verbs, researchers can better understand the dynamics of legal language and its impact on the administration of justice. This understanding is essential for both legal practitioners, who must navigate and construct clear and persuasive legal

[2]Mey (2001).
[3]Huddleston & Pullum (2002).

arguments, and for scholars, who seek to analyse the subtleties of legal language and its effects on legal outcomes.

A significant body of research has focused on the linguistic features of legal English, with particular emphasis on mood and modality. These studies have explored how these grammatical elements contribute to the characteristic formality, precision, and objectivity of legal language. Additionally, the prevalent use of the "shall" construction in legal texts has attracted considerable scholarly attention. From a cross-linguistic and cross-cultural perspective, researchers such as Kimble[4], Calboli[5], Foley[6], Garzone[7], Gotti [8], and Williams[9] have examined the functions and implications of this construction in legal discourse. It is apparent that these studies fail to show **how mood and modality impact the pragmatic aspects of court interpretation and translation.** Mood and modality choices in legal communication influence the pragmatic functions of court interpretation and translation, and impact on the administration of justice. The present study explores the pragmatic functions of legal language, focusing on how mood and modality contribute to legal communication.

The translation of modal verbs in legal contexts has been a significant focus of scholarly investigation. Researchers have explored the complexities and challenges these verbs present when translating between specific language pairs. Zhangjun & Jiang[10] have made notable contributions to understanding these difficulties, highlighting the nuanced interpretations required to accurately convey legal meanings across different languages. Their work underscores the importance of precision in legal translation, where the slightest misinterpretation can have substantial implications. As such, ongoing research continues to explore effective strategies for translating modal verbs to ensure clarity and accuracy in legal documents.

The role of modal verbs in legal communication has been examined by various scholars from diverse perspectives. Zhangjun & Jiang[11] have explored the mechanics of translating modals in courtroom settings and the associated challenges. These modal verbs are essential tools for language users in legal discourse, facilitating the expression of obligation and permission, which are crucial for achieving the speakers' objectives in legal contexts. Additionally, the inherent ambiguity of modal verbs can be strategically employed by legal practitioners to sway cases in their favour[12].

However, these studies primarily focus on broad theoretical frameworks or specific legal systems in predominantly monolingual contexts. There is a notable lack of empirical studies on the pragmatic impact of modal verbs within multilingual legal environments, such as those found in the Kisii Law Courts. This

[4]Kimble (1992).
[5]Calboli (2001).
[6]Foley (2001).
[7]Garzone (2001).
[8]Gotti (2001).
[9]Williams (2005) (2006).
[10]Zhangjun & Jiang (2014).
[11]Zhangjun & Jiang (2014).
[12]Krapivkina (2017).

study seeks to investigate how modal verbs are translated and interpreted in real courtroom interactions in Kisii. By doing so, this study aims to contribute a nuanced understanding of the pragmatic challenges and implications of modal verb usage in legal translations in a multilingual setting, offering insights that can enhance the accuracy and fairness of legal proceedings in such contexts.

Purpose-oriented studies investigating the function of modal verbs in legal discourses assert that modal verbs influence and shape social norms, practices, behaviours, and actions within their respective environments. Cheng & Wang [13] highlight how modals play a crucial role in legal contexts, not only in facilitating communication but also in guiding and regulating conduct according to established legal standards. However, the study does not address their pragmatic impact, particularly in court translation. The influence of modality on legal communication, especially in multilingual and translation-heavy contexts like the Kisii Law Courts, remains underexplored. This study, which is part of a larger on-going investigation, aims to fill this gap by investigating how the use of modal verbs in translations can affect legal clarity, the perception of authority, and the overall administration of justice in a court setting.

Within the context of courtroom interpretations, the pragmatic impact of modal verbs deserves further investigation. How do modal verbs used by the interpreter influence the interpretation of witness testimonies, judge's instructions, and lawyer's arguments? For example, does the use of "could" to translate a statement originally phrased with "might" affect the perceived likelihood of an event?

Passive Voice, Pragmatics and Legal Interpretation

Passive voice is another grammatical feature that characterises legal discourse[14]. Passivisation is a syntactic strategy that allows the interpreter to avoid or suppress the agent in a statement, effectively eliminating or obscuring the identity of the agent[15]. Accurate transmission of passive constructions into interpreted renditions is crucial to avoid meaning shifts that could compromise justice and fair adjudication of proceedings[16]. This strategy underscores the importance of maintaining the original nuances and intent in legal translations to ensure the integrity of legal processes. Despite the extensive literature on the importance of precision and accuracy in legal translations, there is a notable gap in empirical research focusing specifically on the pragmatic impact of passive voice in court translation, particularly within the context of Kenyan courts. Previous studies have predominantly analysed theoretical frameworks or contexts within Western legal systems. However, the unique linguistic and cultural dynamics present in Kisii Law Courts have not been thoroughly examined.

[13]Cheng & Wang (2015).
[14]Jarmołowska (2011); Bulatović (2013).
[15]Cortés (2019).
[16]Mason (2015).

Research in legal communication suggests that the use of passive voice in legal communication can serve various strategic purposes. It can downplay culpability, obscure agency and responsibility, deflect blame, lessen the impact of an action, and dissociate the speaker from potentially incriminating information. Additionally, it can shift the focus onto the object when it is more important than the subject in a case[17]. These functions highlight the deliberate use of passive constructions in legal writing to shape interpretations and influence legal outcomes. While much attention has been given to the strategic use of passive voice in written legal documents, literature concerning its role and impact in oral legal communication, particularly within courtroom settings is lacking. This research seeks to provide insights into the interplay between passive voice usage and legal strategy in a multilingual judicial context, ultimately contributing to a deeper understanding of how language shapes legal processes and outcomes.

The differences in voice between the source language and the target language create challenges for the interpreter. These challenges arise because each language has its own unique set of rules and conventions for expressing voice, which includes aspects like tone, mood, and emphasis. Kordić[18] argues that while some languages and cultures favour the use of the passive voice, others opt for the use of the active voice. This study indicates that whereas English favours the passive voice, Croatian leans towards the active voice. Accordingly, passive voice in English might be rendered differently in a Croatian, requiring the interpreter to not only translate the words but also to adjust the sentence structure to maintain the intended meaning and impact. The interpreter must therefore possess a deep understanding of both languages to convey the message accurately and effectively, ensuring that the original sentiment and context are preserved. This intricate process demands a high level of skill and adaptability, highlighting the complexities inherent in interpretation.

By analysing the use of passive voice through the PAT lens, we can explore how it interacts with social context and speaker intention within the courtroom setting. Does the use of passive voice when translating witness testimonies shift focus from the perpetrator to the action itself? How might this influence the understanding of culpability by the judge or magistrate?

Nominalisation, Courtroom Discourse and Pragmatics

Nominalisation, the process of converting verbs and adjectives into nouns, is a significant grammatical feature. Despite its regular use in courtroom communication, nominalisation remains a little-studied topic of inquiry.[19] Bhatia[20] discusses the pervasive use of nominalisation in legal English. He argues that nominalisation contributes to the formality and impersonality of legal texts,

[17]Eggins (2004); Haigh (2009); Chaemsaithong (2021)
[18]Kordić (2020).
[19]Bhatia (1983); Jottini (2002); Williams (2008); Haigh (2009).
[20]Bhatia (1993).

making them more complex and less accessible to laypersons. It is a useful linguistic device used to condense information and enhance textual cohesion.

Mattiello[21] investigates nominalisation in English and Italian legal discourse, particularly the syntactic structure of complex noun phrases in the two languages and identifies their crucial pragmatic functions and effects in a textual dimension and in anaphoric references in both languages. The study demonstrates the massive use of nominalisations in written normative legal texts, in that it is often viewed as an element of interpretative difficulty for the receiver. However, a highly nominal style is bound to create difficulties in the unpacking of such expressions, especially for Bhatia[22]. While these studies provide valuable insights into the use and impact of nominalisation in legal texts, they predominantly focus on Western languages and legal systems. There is a notable gap in research examining how nominalisation affects court translation in non-Western contexts, particularly in African legal systems.

Nominalisation is a key feature of academic discourses and an important grammatical resource in legal discourses, helping writers construct a specialised lexical register. Wang[23] examined its impact in legal texts from a discourse perspective, discovering that nominalisation aids in the realisation of technicalisation, rationalisation, and interpersonalisation. Specifically, nominalisation aids in the creation of technical words across many disciplines, organises the text using periodicity, and facilitates either alienation or solidarity among language users. Lei and Yi [24]also reviewed four types of empirical studies on nominalisation—syntactic structure analysis, pragmatic function analysis, textual dimension studies, and anaphoric reference studies—concluding some limitations in existing research. Their systematic and comprehensive analysis identified nominalisation patterns both quantitatively and qualitatively, but focused primarily on Western languages and legal systems. Additionally, their review did not extensively cover the pragmatic implications of nominalisation in legal translations, particularly in multilingual court settings. This gap is critical because legal translations require a precise and context-sensitive approach to ensure justice and comprehension across different languages. The current study aims to fill this gap by exploring the pragmatic impact of nominalisation in court translation at the Kisii Law Courts, thus contributing to a more comprehensive understanding of nominalisation across diverse linguistic and legal landscapes.

Dealing with nominalised expressions in court translation and interpretation is a challenging task. If not properly handled in translation, they can lead to ambiguities and misunderstandings, obscure meaning and agency, reduce the explicitness of legal language, affect the clarity and precision of legal language as well as complexity of legal texts[25]. This therefore requires a strategic approach to the translation and interpretation of these linguistic structures to improve clarity and comprehension in legal proceedings to ensure that the intended meaning is

[21]Mattiello (2010).
[22]Bhatia (1983).
[23]Wang (2003).
[24]Lei and Yi (2019).
[25]Tiersma (1999); Berk-Seligson (2002); Gibons (2003); Hale (2004); Coulthard & Johnson (2007).

conveyed accurately. The key guide towards accurate translation of nominalisations being context and the need for a deep understanding of both the source and target languages[26]. However, these studies have predominantly focused on broader contexts, or other jurisdictions, leaving a gap in understanding how nominalisations affect legal translations and interpretations within the Kisii Law Courts. The current study offers context-specific insights of nominalisations in court translation at Kisii Law Courts, highlighting the unique challenges and strategies pertinent to this setting.

In conclusion, nominalisation plays a critical role in the linguistic landscape of legal discourse, shaping the formality, complexity, and interpretative challenges of legal texts. While existing research has thoroughly examined nominalisation in Western legal systems, there remains a significant gap in understanding its impact in non-Western contexts, particularly in the realm of court translation and interpretation. This study addresses this gap by focusing on the Kisii Law Courts, providing valuable insights into the pragmatic effects of nominalisation in a multilingual legal setting. By exploring the unique challenges and strategies involved in translating nominalized expressions, this research contributes to a deeper comprehension of the nuanced interplay between language, law, and translation in African legal contexts. Ultimately, a more context-sensitive approach to nominalisation in legal translations is crucial for ensuring clarity, accuracy, and justice in court proceedings, underscoring the importance of linguistic expertise in legal settings.

Methodology

The primary data source for this study are recordings of courtroom proceedings from the Kisii Law Courts. With permission from the relevant authorities (the court administration, and NACOSTI through the University of Nairobi, Kiswahili Department), audio recordings of court cases were collected between September 2020 and April 2021 by the first author. A purposive sampling technique was used to select court cases that involve witness testimonies, judge's instructions, and lawyer's arguments. This ensured the data corpus contains relevant examples for analysis.

The collected audio recordings were transcribed verbatim creating a textual dataset for further analysis. A coding scheme was developed to identify and categorize instances of modal verbs, passive voice and nominalisations used in the transcripts. The coding scheme considered the grammatical form, the speaker (judge, lawyer, litigant, interpreter), and the speech act context (e.g., question, statement, instruction). A qualitative thematic analysis approach was used to identify recurring patterns and themes in the use of modal verbs and passive voice across the transcripts. This involved identifying how these grammatical structures shape the interpretation of speech acts within the courtroom setting. The analysis was

[26]Huyên (2011).

guided by the principles of PAT, focusing on speech act theory, intention recognition, and context dependence.

Pragmatic Act Theory (PAT)

This paper utilizes Pragmatic Act Theory (PAT) for analyzing the pragmatic impact of selected grammatical structures in courtroom interpretations. PAT emphasizes the importance of "situated speech acts" and the social context in understanding the meaning conveyed beyond the literal words spoken (Mey, 2001). This framework is particularly suited to this study as it allows us to move beyond grammatical analysis and explore how these structures influence the interpretation of courtroom interactions within a specific social and legal setting.

PAT views language as a form of action. When people speak, they perform an act with a specific intention, such as informing, requesting, or persuading (Mey, 2001). In the courtroom, interactants perform speech acts with specific goals in mind. Judges issue rulings and directives that must be followed; lawyers present arguments intended to convince the court of their client's position; and litigants provide testimonies that can affirm or challenge the narratives being constructed in the courtroom. Each utterance is a strategic act designed to achieve a particular objective within the legal process.

PAT emphasizes the importance of recognising the speaker's intention behind their words. This intention goes beyond the literal meaning and considers the speaker's purpose and desired outcome within the specific context. In the courtroom, understanding these intentions is crucial for interpreters, who must accurately convey not just the words spoken, but the underlying purposes and strategies. The failure to capture these nuances can lead to misunderstandings and misrepresentations that affect the fairness and outcome of legal proceedings.

Meaning in PAT is highly dependent on the context in which the speech act occurs. This context includes the social setting, the participants' roles and relationships, and the shared knowledge they possess[27]. The courtroom has a distinct social context with established power dynamics and specific goals. Understanding this context is crucial for interpreting the intended meaning behind grammatical structures used in courtroom interactions.

The application of PAT to the analysis of courtroom interpretations underscores the complexity and significance of language as a form of action within legal settings. By focusing on the intentions behind speech acts and the social context in which they occur, PAT provides a nuanced framework that extends beyond mere grammatical analysis. It reveals how strategic language use in the courtroom is integral to the functioning of the legal process, influencing the interpretation, fairness, and outcomes of legal proceedings. This study highlights the critical role of interpreters in capturing these subtleties, demonstrating that the meaning conveyed in legal interactions is deeply intertwined with the social and situational dynamics of the courtroom. As such, PAT offers valuable insights into

[27]Mey (2001).

the pragmatic dimensions of legal language, emphasising the importance of context and intention in understanding and interpreting courtroom discourse.

Grammatical Structures, Pragmatics and the Interpretation and Translation of Legal Discourses

Grammatical structures have a significant influence on the interpretation and translation of legal discourses within a court setting, leading to shifts in intended meaning and pragmatic effects. The way sentences are constructed, the choice of modal verbs and the use of passive or active voice and nominalisation can all alter how a statement is understood and its impact on the listener. In legal contexts, any slight change in grammatical structure can transform the illocutionary force of a statement, altering its intent from a command to a suggestion, from a fact to an opinion, or from a clear directive to an ambiguous remark. Interpreters must navigate these grammatical subtleties to ensure that the original intent and pragmatic effects of the speaker's words are accurately conveyed in the target language.

Modal Verbs, Pragmatics and Meaning Making in Interpreted Courtroom Discourse

Understanding the use of modal verbs is complex because it involves both logical (semantic) meanings and practical (pragmatic) aspects influenced by social and psychological factors[28]. Any interpretation that fails to consider this duality risks altering the meaning transmitted into the target text. Social and psychological factors, such as condescension, politeness, and irony, can significantly impact the basic semantic meanings of modals in mediated courtroom communication. Therefore, accurately interpreting modal verbs requires a nuanced understanding of both their inherent meanings and the contextual influences that shape their use.

Modal verbs express degrees of possibility, necessity, or obligation[29]. Modal verbs such as "must," "shall," "may," and "can" carry varying degrees of obligation, permission, and possibility, which can alter the way statements and questions are understood and interpreted in a legal context[30]. In legal contexts, they can be used to indicate the level of certainty or authority of a statement or requirement, as well as the consequences of non-compliance[31]. In court proceedings, the use of modal verbs contributes to the illocutionary force and perlocutionary effects of speech acts, influencing the perception of the speaker's intention by the recipient. The illocutionary force refers to the intended function of the speech act, such as commanding, questioning, or asserting[32]. For example,

[28]Leech (2004).
[29]Leech (2004); Biel (2014).
[30]Searle (1969); Bhatia (1983); Leech (2004).
[31]Lundquist (2015).
[32]Searle (1969).

when a judge uses "must" in a directive, it indicates a strong obligation, leaving no room for discretion. Conversely, when an advocate uses "may" while cross-examining a witness, it suggests a possibility or permission, which can subtly influence the witness's response or the perception of their testimony. The perlocutionary effect, on the other hand, is the impact that the speech act has on the listener, which includes their emotional response, belief, or action taken as a result. For instance, an advocate's use of "should" in a closing argument might persuade the judge to view the defendant's actions as ones they ought to condemn, thereby affecting the deliberations and verdict. In the multilingual and multicultural context of Kenyan courtrooms, the interpretation of these modal verbs becomes even more complex. Interpreters must accurately convey both the illocutionary force and perlocutionary effects of the original speech act, ensuring that the recipient's perception of the speaker's intention remains intact. This task requires not only a deep understanding of the source and target languages but also an awareness of the legal and cultural subtleties that influence interpretation. This is illustrated in the following example, from the *Republic v. Otwoma*, *MCSO/18/2020*[33] where the accused could not take plea when he was first presented to court on account of the injuries sustained during his arrest that required medical attention and the court had to make a determination. The suspect was alleged to have participated in the murder of four elderly women;

Magistrate:	*The suspect **shall** be remanded at the Kisii Central Police Station. Since the suspect reported that he is feeling unwell he **can** be taken to Kisii Teaching and Referral Hospital for treatment.*
Interpreter:	*Utafungwa katika kituo cha Polisi cha Kisii Central. Pia utapelekwa Kisii Level Six kutibiwa. {You will be detained at Kisii Central Police Station. You will also be taken to Kisii Level Six (Hospital) for treatment}.*

The magistrate declares that the accused must be held in the Kisii Central Police Station and employs the modal verb "shall" to denote a mandatory action. On the other hand, the modal verb "can" is used to suggest that the possibility of suspect to be escorted to Kisii Teaching and Referral Hospital to seek medical attention. Although interpreter precisely and successfully conveys the core message through the interpreting process, there are minor variances in how modality is expressed. In the first part the modal "**shall**," has been interpreted using the prefix "*-ta*" in "*u**ta**fungwa*" (you will be locked up) maintaining the sense of a compulsory action. However, the phrase "*utapelekwa*" which has been used for "**can**" implies a sense of obligation, in contrast to the possibility and permission that is suggested by the phrase "can be taken," which is also interpreted as "*utapelekwa*" (you will be taken), instead of "*umeruhusiwa kupelekwa"* (you have been permitted to be taken). Overall, despite some minor linguistic deviations, the interpreter's rendition largely adheres to the original statement's pragmatic meaning, which stipulates that the accused must be detained at the Kisii

[33]*Republic v. Otwoma*, *MCSO/18/2020*

Central Police Station and that, given his alleged medical condition, he may be sent to the Kisii Teaching and Referral Hospital for treatment. The interpreter retains the imperative tone that the original modal verbs suggested. The English modal verb "shall", is often used in legal texts to indicate a mandatory requirement, whereas "can" indicates possibility. However, in the example above, these two have been assigned a similar rendition in Kiswahili. Such differences in modal systems affect the intended meaning and skopos of legal translation or interpretation, consequently, the interpretation of modal verbs requires careful consideration by the translator or interpreter.

The use of modal verbs in legal texts often results in different levels of obligation, permission, or possibility in court interpretation and translation. Generally, the use of "**shall**" signifies a compulsory obligation, "**may**" implies permission or potentiality, "**must**" denotes a stringent demand, and "**should**" suggests a recommendation. Ensuring the preservation of the legal meaning and intent is of utmost importance when translating and interpreting modal verbs. Even minor changes in these words might result in significant negative implications within a legal context. If these levels are not accurately transmitted into the TT, they can lead to pragmatic meaning shifts, as it is in the following example, from *The Republic v. Kingoina, MCCR/19 11/2017*[34].

Advocate:	*Where did you meet the accused?*
Interpreter:	*Ulimkuta mshtakiwa wapi? {Where did you meet the accused?}*
Witness:	*I **might have** seen him near the bank.*
Interpreter:	*Nimemwona karibu na benki. {I have seen the accused near the bank}*

The modal verb "might" convey possibility or uncertainty. The speaker does not know for sure if he spotted the suspect close to the bank. But depending on the circumstances, this sentence may mean several different things in a legal setting. For instance, the use of "**might**" in the evidence presented by the prosecution against the accused could imply that the witness's testimony is unreliable, which would undermine the case against the suspect, or it could call for additional evidence to confirm the trustworthiness of the witness's testimony. The interpretation chose to use the translation "*nimemwona*," which means "I have seen," instead of the modal in order to show assurance. This is a radical departure from the original. The interpretation makes a clear claim that the accused was seen by the witness close to the bank. The witness's intended illocutionary force is misrepresented by the interpreter's failure to appropriately convey this doubt. This departure from the initial uncertainty could have an impact on how the witness's statement is interpreted and understood in its entirety. The use of the past tense distorts the witness's testimony into being more confident than it was supposed to be because of his uncertainty, which was pertinent to the evidence that was provided.

Modal verbs play a crucial role in conveying legal nuances and obligations within a text. Their interpretation can substantially affect the legal consequences of

[34]*The Republic v. Kingoina, MCCR/1911/2017*

a statement. They shape the illocutionary force and perlocutionary effects of speech acts, influencing the perception of the speaker's intention by the recipient. Ensuring the preservation of the legal meaning and intent when translating and interpreting modal verbs is paramount. Interpreters must accurately convey the illocutionary force and perlocutionary effects of modal verbs, considering the legal and cultural nuances to maintain the integrity of the original message.

Voice, Pragmatics and meaning shift in Interpretation

In grammar, "voice" refers to the form of a verb that indicates the relationship between the subject of the sentence and the action or state described by the verb [35]. There are two primary voices: active voice and passive voice. In the active voice, the subject of the sentence performs the action. In the passive voice, the subject of the sentence is acted upon by the verb. The object of the action becomes the subject of the sentence. The choice between active and passive voices in court proceedings significantly impacts the clarity, tone, and emphasis of legal communication. While active voice promotes directness and clarity, passive voice can enhance formality and impartiality. Translating these voices accurately requires a deep understanding of linguistic nuances and legal conventions to ensure the intended meaning is preserved across languages.

Active voice is preferred for its directness, vigour, and clarity[36]. It is more straightforward than its passive counterpart. It clearly assigns responsibility or action to a subject, which is crucial in legal arguments and judgments, lending vigour to legal arguments by making them more forceful and assertive as can be seen in the following example from *Republic v Oyaro [2022] eKLR.*[37]

Judge:	*The post mortem report indicates that the deceased died as a result of complication of the chest with a sharp forced trauma.*
Interpreter:	*Marehemu alikufa kutokana na shida za kifua jinsi uchunguzi wa daktari unavyoonyesha (the deceased died due to chest problems as indicated by the doctor's report)*

The original sentence in active voice places the focus on the post mortem report and the specific cause of death. The agency is clear, suggesting an explicit cause (sharp forced trauma). However, the interpreted rendition in passive voice shifts the focus away from this specific cause to a more generalised cause ("chest problems"). This can diffuse the explicit responsibility and make the statement less direct. The active construction provides a clear, direct description of the cause of death, which is important in legal and medical contexts where specificity is crucial. The passive construction results in a less specific and potentially

[35]Strunk & White (2000).
[36]Strunk & White (2000).
[37]*Republic v Oyaro* (Criminal Case 6 of 2022) [2023] KEHC 21354 (KLR) (21 July 2023)

ambiguous statement, as "chest problems" is a broader term than "complication of the chest with a sharp forced trauma."

The original statement by the judge performs two acts – informing and asserting. It provides specific information about the cause of death and clearly states the results of the post mortem report. However, the interpreted renditions depart from these acts to mitigate and defocus. It potentially softens the harshness of the cause by generalising it and reduces the emphasis on the specific traumatic cause of death, which could be a strategy to lessen the emotional impact.

The shift from active to passive voice in the interpretation has significant pragmatic effects. It changes the focus from a specific, direct cause of death to a more general and potentially less alarming cause. This shift can alter the perceived agency and responsibility, making the statement less confrontational and possibly more palatable for the audience. This change in voice can serve different communicative purposes, such as mitigating the emotional impact while potentially sacrificing specificity and clarity.

The ST as uttered by the judge is in active voice. Here, the subject ("the post mortem report") performs the action of indicating. The interpreted rendition on the other hand is in passive voice, which shifts the focus, its subject "*uchunguzi wa daktari*" (the doctor's report) is performing the action of indicating, but this is less prominent. Instead, the focus is more on "*marehemu alikufa*" (the deceased died) and the cause. The action is implied to be performed by "*uchunguzi wa daktari*" (the doctor's report), but it's not the main subject performing the action directly. Unlike the ST where the focus is on the action, the main focus of the TT is on the result "*marehemu alikufa*" (the deceased died), and then attributing this information to the doctor's report. This shift potentially affects how the information is perceived, actually placing more emphasis on the outcome and its medical attribution rather than the reporting process.

As noted earlier, passive voice constructions affect responsibility attribution and ultimately impact the interpretation of evidence and witness statements. In legal discourse, it can obscure who is responsible for an action. Sometimes, passive voice can be strategically used to omit the subject, which might be necessary for various legal reasons, such as when the subject's identity is unknown or irrelevant. A suitable example that illustrates the impact of passive voice on responsibility attribution and interpretation of evidence is found in the traffic case of *Samwel Ochako v. Gerald Oremo, MCCC/790/2019* [38] where the respondent during the defense hearing was arguing that the car was damaged during a heated exchange that ensued after the vehicles involved in the accident had collided.

Advocate: *Can you describe what happened to the car?*
Interpreter: *Nonyare koeresa ekiaberete egari? (Are you able to explain what happened to the vehicle?)*
Witness: *Egari nigo yasaretigwe ekero bare kwomana. (The vehicle was damaged when they were quarrelling)*
Interpreter: *The car was damaged during the altercation.*
Advocate: *Who damaged the car?*

[38] *Samwel Ochako v. Gerald Oremo, MCCC/790/2019*

Interpreter: *Ning'o oyesaretie? (Who damaged it)*
Witness: *Aro timanyeti buya, rakini ekero nayerigereretie konye yasarigwe. (I do not know very well, however when I looked at it, I saw it already damaged)*
Interpreter: *I'm not sure, it was just damaged when I looked.*
Advocate: *Was there anyone around the car when it was damaged?*
Interpreter: *Onde naroo orenge ang'e ekero yasaretigwe? (Was anyone close by when it wa damaged?)*
Witness*:* *Ee, ko bono tindochi kabisa ng'a ning'o oyesaretgie. (Yes, but then I never actually saw who damaged it).*
Interpreter*: Yes, but I didn't see who actually did it.*

In this example, the use of the passive voice "The car was damaged" ("*egari eyasaretiwe*") in both the English and Ekegusii versions omit the subject who performed the action. This omission affects the attribution of responsibility because it leaves out who actually caused the damage. The witness's statements, in passive voice, avoids specifying the responsible party, which can lead to ambiguity in legal interpretation. This is a strategic use of passive voice, possibly because the witness genuinely does not know who damaged the car, or they might be avoiding implicating someone directly. In legal settings, this lack of clarity significantly impacts the proceedings, as it obscures accountability and could lead to various interpretations or misunderstandings.

Passive voice constructions allow the focus to be on the action, process or event rather than on the agent or doer of the action[39]. In passive voice, the syntactic arrangement places the emphasis on the receiver or the process, rather than the agent or the doer of the action [40]. For example, "**The evidence was collected**" is a passive voice construction used by the prosecutor while reading the facts of an assault case in which the accused pleaded guilty. But in the statement the person responsible for collecting the evidence is not explicitly mentioned. On the other hand, the interpreter offers a rendition that expressly mentions who collected the evidence "*Afisa wa polisi akakusanya ushahidi*, (a police officer collected the evidence) effectively shifting from the original passive voice to an active voice construction that explicitly states the agent responsible for the action. The choice of passive voice impacts the attribution of responsibility and influences the interpretation of evidence or witness statements in court proceedings.

In legal texts, the use of passive voice, a linguistic construction where the subject of the sentence, the one performing the action, is either not explicitly stated or is positioned after the action. This grammatical structure when it is adopted, it shifts the focus from the doer of the action to the action itself. Its use in court interpretation and translation contexts, introduces a layer of complexity, as it can lead to pragmatic meaning shifts with potential adverse implications for legal proceedings. The use of passive voice has the potential to disguise the agency and responsibility of those involved, which may result in ambiguity or confusion[41]. In the present study an example illustrating this phenomenon is in *Samwel Ochako v.*

[39]Bhatia (2010).
[40]Nord (1997).
[41]Bhatia (2010).

Gerald Oremo, MCCC/790/2019[42], a traffic case, where the reporting of events was crucial for establishing liability:

Advocate:	*While driving along Kisii -Migori road when at Itierio junction area* ***you negligently drove the said motor vehicle*** *and permitted it to collide with motor vehicle registration number xxxx. Occasioning injuries on the complainant?*
Interpreter:	*Gari lako likagongana na gari linguine sehemu ya Itierio na kusababisha majeraha kwa mlalamishi?* {Your vehicle collided with another vehicle at Itierio causing injuries on the complainant}

In the original statement by the advocate, the active voice is used to attribute responsibility to the respondent for negligently driving the motor vehicle and causing a collision. The advocate is emphasising the actions of the driver, clearly stating that the driver was the one who negligently operated the vehicle, leading to the collision. The active voice in this context not only identifies the responsible party but also emphasises their agency in the actions described. This grammatical choice is often employed in legal discourse to convey a sense of accountability and to highlight the specific individuals involved in a given event. In contrast, the passive voice might alter this emphasis by de-emphasising the doer of the action and shifting the focus to the action itself, as seen in the interpreted rendition. In the interpretation provided, a shift to passive voice is observed. The interpreter does not directly attribute the action to the subject; rather, it describes the event in a more neutral way.

The pragmatic meaning shift in this case is a shift in emphasis from the advocate's accusatory tone to a more neutral and factual representation of the events. The interpreter's use of the passive voice downplays the responsibility of the subject and presents the information in a less confrontational manner. This change in linguistic structure can affect the perceived tone and level of blame in the interpretation. The passive voice is often used to focus on the action itself rather than the doer of the action, creating a more detached and objective tone.

The nuanced use of voice in legal language can significantly influence how events are framed and understood within a legal context. In this instance, the passive voice obscures the identity of the driver, whose negligence led to a collision with another vehicle leading to the passengers' sustaining injuries, placing the emphasis on the action rather than explicitly identifying the responsible party. This subtle linguistic choice does introduce ambiguity during the translation or interpretation process, impacting the clarity and accountability attributed to the individuals involved. As such, interpreters and translators must navigate these nuances diligently to ensure that the intended legal implications are accurately conveyed in the TL, minimising the risk of misinterpretation or misunderstanding. Pragmatic shifts arising from passive constructions have the

[42]*Samwel Ochako v. Gerald Oremo, MCCC/790/2019*

potential to significantly influence how events and individuals are perceived within the legal framework.

Nominalisation, Pragmatic Shifts and meaning in Legal Interpretation

Nominalisation, the process of converting verbs, adjectives, or adverbs into nouns[43], offers communicators a way to condense ideas and create a more formal tone. It is a common feature in legal discourse that can enhance formality and precision. However, its overuse introduces ambiguity, vagueness, and interpretive challenges in communication. Nominalised phrases often obscure the agent performing the action, making the sentence passive and unclear about who or what is doing what[44]. Additionally, nominalisations can have multiple meanings depending on the context, leading to confusion for the target audience as demonstrated in the following example from a theft case *Republic v. Mwebi, MCCR/18/2020*[45].

Magistrate:	Any objection?
Interpreter:	*Unapinga ama unakubaliana*? (Do you object or you agree?).

The question "Any objection?" contains the nominalized form "objection," which is a noun derived from the verb "to object." The use of "objection" here is a clear example of nominalisation. The Kiswahili translation uses the verbs "*unapinga*" (you object) and "*unakubaliana*" (you agree). This is a verbal rather than a nominal form. The translation avoids nominalisation by directly using the verbs. The translation is more direct and explicit, asking the respondent to either confirm or deny agreement directly through action verbs. The interpreter chose a more verbose and explicit construction compared to the more concise nominalised English phrase. The difference might reflect cultural or linguistic preferences. English often uses nominalisation to create more abstract and concise expressions, especially in legal contexts, while Kiswahili favours a more straightforward verbal approach. The translation maintains the functional equivalence of the original message. Even though nominalisation is not used, the essential meaning is preserved, ensuring the respondent understands the question's intent. The provided translation highlights a significant linguistic shift from nominalisation in English to a more explicit verbal form in Kiswahili. This shift reflects differences in how the two languages handle actions and processes. In translating legal or formal speech, such choices can affect the clarity and directness of the communication, but in this case, the functional equivalence is maintained, ensuring that the meaning is clear and unambiguous in both languages.

Nominalisations can make sentences more abstract, which may obscure the specific actions and responsibilities involved. For instance, "the implementation of the order" is less clear than the rendition "*Omo-OCS agaikerania ogochika*

[43]Fan, Tan & Li (2022).
[44]Strunk & White (2000).
[45]*Republic v. Mwebi, MCCR/18/2020*

gwekegambero" (the OCS implemented the order). The interpretation offered clearly identifies who is performing the action.

The interpreted rendition offered enhances clarity and communicative effectiveness. Following PAT, it focuses on the context-dependent nature of language use, emphasising how speakers and listeners use language to perform various acts within specific contexts[46]. The phrase "the implementation of the order" is an example of nominalisation where the verb "implement" is turned into the noun "implementation." This abstraction potentially obscures the agent responsible for the action, making it less clear who is performing the implementation. In a legal context, such ambiguity might lead to confusion or misinterpretation regarding accountability. In contrast, the interpretation "*Omo-OCS agaikerania ogochika gwekegambero*" (the OCS implemented the order) removes this ambiguity by clearly identifying the OCS (Officer Commanding Station) as the agent. This direct identification aligns with the pragmatic principle of clarity, ensuring that the listener understands who is responsible for the action.

Intentions behind utterances and how they are perceived by listeners is an integral part in understanding what is said by a speaker. In the nominalised form, "the implementation of the order," the intention behind specifying who is responsible is less transparent. This can be problematic in situations where understanding the agent's role is crucial, such as legal proceedings or administrative processes. The interpretation "*Omo-OCS agaikerania ogochika gwekegambero*" makes the intention explicit by attributing the action directly to the OCS. This not only clarifies who carried out the order but also implicitly addresses the responsibility and accountability of the OCS. Such explicitness can reduce misunderstandings and ensure that the intended message is accurately conveyed.

Every utterance performs a specific act within a given context. The nominalised form "the implementation of the order" performs an act of abstraction, potentially distancing the speaker from specifying details. This can be useful in contexts where generalisation is needed, but it can also hinder precise communication. The interpreter's rendition "*Omo-OCS agaikerania ogochika gwekegambero*" performs a different pragmatic act: it conveys specificity and accountability. By naming the OCS as the agent, the interpretation performs an act of specification, which is crucial in contexts requiring clear attribution of actions. This act of specification enhances the pragmatic function of the utterance by making the communicative intent more transparent.

Social and cultural contexts is another key factor in interpreting utterances. In judicial settings, there is a preference for directness and clarity over abstraction. The interpreter's choice to specify the OCS as the agent reflects an understanding of the institutional need for clear attribution of responsibility. In courtroom contexts where hierarchy and roles are clearly defined, specifying the agent is essential for maintaining order and accountability. The interpretation aligns with these contextual expectations, ensuring that the message is appropriately tailored to the legal norms.

[46]Mey (2001).

The employment of nominalisation in legal discourses frequently yields abstract or technical language that poses challenges for comprehension during court interpretation and translation. It is further used to make abstract concepts more concrete. This involves constructing intricate noun phrases, which introduce ambiguity, imprecision, and vagueness. Court interpreters and translators can encounter challenges when working with legal materials due to the presence of nominalisation, resulting in the utilisation of excessively intricate or specialised terminology. This is an important pragmatic meaning shift in court interpretation and translation, as it helps to maintain impartiality and neutrality in the language used to describe the events of the case. For example, in delivering a judgement in an assault case, *Republic v. Kemunto, MCCR/05/2020*[47], the magistrate said, "the accused person's actions caused the victim serious harm." This was rendered by the court interpreter into Kiswahili as "*ulimsababishia mlalamishi majeraha makubwa*." This is a rendition without the nominalisation that is in the original, which can be translated into English as "**you caused serious harm to the complainant**." Were the interpreter to preserve the nominalisation, this could have been rendered as, "*matendo ya mshtakiwa yalimsababishia mlalamishi majeraha makubwa*." The verb "caused" in the target text is translated as "*yalimsababishia*," which is a simple past tense verb. The nominalisation is not included in this particular translation. However, in the target text with nominalisation, the same verb is translated as "**kusababisha**," which is the nominalised form of the verb.

The use of nominalisation in the original text is to direct the attention of the audience onto the complaint itself. However, the process of denominalisation shown in the interpretation results in a shift of focus, ultimately centring on the complaint. This suggests that the victim's involvement is diminished to that of a mere complainant rather than an active participant in the incident. The significance of this pragmatic meaning shift in CIT lies in its ability to underscore the impact of language choices on the perception and interpretation of evidence presented in court.

Conclusions

The use of different grammatical structures in legal texts thus affect the intended meaning and pragmatic effects of speech acts in court proceedings. Language is a multifaceted and intricate means of communication that undergoes development and transformation within the context of cultural environments, resulting in variations in grammar. The presence of grammatical differences has a substantial influence on the interpretation and translation of legal discourses within a court setting, leading to shifts in meaning and pragmatic implications. Modal verbs and passive voice constructions are important grammatical structures in legal language that shape intended meaning and pragmatic effects. Modal verbs are used to express different levels of obligation, possibility, or advisability, whereas passive voice constructions affect the attribution of responsibility.

[47]*Republic v. Kemunto, MCCR/05/2020*

Differences in grammatical structures across languages can result in pragmatic meaning shifts during interpretation and translation. It is crucial for court interpreters and translators to consider these grammatical complexities to accurately convey the intended meaning and effects of pragmatic acts in court proceedings.

It is important to note that this study focused on a specific courtroom setting (Kisii Law Courts) and language pair Ekegusii-Kiswahili-English. Therefore, the findings might not be generalisable to other legal contexts or languages. We therefore recommend for more research to be conducted in other courts and jurisdictions so as to enable comparisons that can lead more reliable generalisations.

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